Supreme Court, U.S.
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OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

CONCHO RESIDENTIAL SERVICE, INC., Petitioner

VS.

MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER,

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On Petition For Writ Of Certiorari to the Court Of Appeals, Third Supreme Judicial District, at Austin, State of Texas, No. 03-98-00022-CV

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal Antitrust Immunity

1. Doesn't the Local Government Antitrust Act of 1984 merely limit the remedies available when local government activities violate federal antitrust law, allowing injunctive relief but not damages, or does it exempt their activities altogether?

2. Mindful that *Parker* "state action" immunity is disfavored, how extensively must a state appellate court inquire and then articulate facts and law before it may conclude sufficient "state action" exists to immunize wrongful conduct, especially where the conduct impacts disabled citizens and the trial court summarily dismissed the antitrust action without making factual or legal findings relating to the *Parker* "state action" doctrine?

3. With respect to the *Parker* "state action" antitrust exemption, isn't it error to apply the "state action" test for a "state" actor, instead of the respective tests for a "municipal" actor or a "private" actor, where the actor, objectively, is a local organization acting in a contractual capacity, and only by statutory legal fiction is deemed an agency of the state for a limited purpose?

4. If a State plainly misreads its antitrust act to incorporate the *Parker* "state action" doctrine, does not the result, which confounds federalism and encourages violation of medicaid law's "freedom of choice" protection for disabled citizens, enable U.S. Supreme Court review?

Due Process For Creating Public Organization

5. What minimum formative acts and documentation does "due process of law" require before an organization can claim a public charter and clothe itself with government immunity when it injures citizens?

Corporate Disclosure Statement: Concho Residential Service, Inc., a Texas corporation ("CRS"), is not owned by a parent corporation and no publicly held company owns 10% or more of its stock. CRS owns stock in Oxford Square, Inc., a Texas corporation, that is not publicly held.

Abbreviations: CR ...Clerk's Record SCR...Supplemental Clerk's Record

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CITATION OF REPORTS

There are no published reports in this case. Texas' Third Court Of Appeals' opinion (Appendix, 20) established many new rules of state and federal antitrust law but was not published.

BASIS FOR JURISDICTION

Petitioner seeks review of a judgment of a lower state court that was subject to discretionary review by the state court of last resort. Texas' Third Court of Appeals issued its Judgment on November 12, 1999 (Appendix, 35). The Texas Supreme Court denied petitioner's petition for discretionary review on March 9, 2000 (Appendix, 37), and denied petitioner's motion for rehearing on April 27, 2000 (Appendix, 38). The basis for the U.S. Supreme Court's jurisdiction is 28 U.S.C.A. § 1257 (West 1993).

CONSTITUTION, STATUTES, REGULATIONS

15 U.S.C.A. § 35 (a) (West 1997): "No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity."

42 U.S.C.A. § 1396a (a) (23) (A) (West Supp. 2000): "A State plan for assistance must-- ... provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis) who undertakes to provide him such services, ..."

42 U.S.C.A. § 12132 (West 1997): "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

U.S. Const. amend. V: "No person shall be ... deprived of life, liberty, or property, without due process of law... ."

U.S. Const. amend. XIV, § 1: " ... No State shall ... deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Procedural History

This is a suit for lost profit damages and injunctive relief by a private, Texas corporation Concho Residential Service, Inc. ("CRS") owned by Robert and Marilyn Cochran. In 1989 CRS began opening and operating fully-licensed Intermediate Care Facility/Mentally Retarded ("ICF/MR"), 6-bed homes for mentally retarded citizens in San Angelo, Texas, but suffered a high vacancy rate in its five homes and experienced financial losses because the referral center, a local public organization known as MHMR Services For The Concho Valley ("CONCHO VALLEY") would not tell inquiring persons about the availability of the homes and refused to deal with CRS. CONCHO VALLEY had been contractually given the regional responsibility for informing people of mental retardation services and facilities available in the area.

CRS sued in state district court under Texas' antitrust act in 1992, and also sued under Texas' deceptive trade practices act and other laws. CRS sued, among others, CONCHO VALLEY as an unincorporated association and some of its staff. CRS also sued Tom Green County as a principal in the unincorporated association, and sued a lobbyist corporation known as the Texas Council which CRS believed encouraged the injurious conduct.

The trial court invited defendants' counsel to file motions for summary judgment on the antitrust claims and thereafter dismissed the suit on the summary ground that no material fact issues were raised by CRS' pleadings and its summary judgment evidence. Texas' Third Court of Appeals affirmed the summary judgment and the Texas Supreme Court refused discretionary review.

Factual Chronology

1964 County must support needy mentally retarded residents.[1]

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[1] Tex. Rev. Civ. Stat. Ann. art. 2351 (Vernon 1971).

1965 MHMR Act[2] offers new "community center" option, to be exercised by written contract approved by local governing bodies.

1965-1997 No local governing bodies authorize a contract and none is ever signed to establish a community center in San Angelo.[3]

1968-1997 TOM GREEN COUNTY and CITY OF SAN ANGELO annually donate funds to MHMR organization known as CONCHO VALLEY and join others in appointing its board of trustees.[4]

1978 TDMHMR auditors find there is no record of statutorily-required contract establishing CONCHO VALLEY. CR 1687-1688, 1702.

1985 Legislature replaces grants-in-aid support of community MHMR centers with right of first refusal to TDMHMR contracts that pay local entity to provide MHMR services.[5]

1988 CONCHO VALLEY, claiming community center credentials, qualifies for "designated provider" contracts from State.[6]

Sept. 1988 TDMHMR purchases by contract CONCHO VALLEY's

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[2] Mental Health And Mental Retardation Act, 59th Leg., R.S., ch. 67, 1965 Tex. Gen. Laws 165.

[3] CR 2802 (CV's Prod. #1); CR 3917-3918 (City's Prod. #1-#3); CR 3895 (City's Interr. #3).

[4] CR 1991-1992 (Post aff.); CR 2361 (TGC Ans. Inter.); CR 3620 (TGC Reply); CR 872 (CV's Admiss. #37).

[5] Act of May 17, 1985, 69th Leg., R.S., ch. 496, p. 2077-2078. The bill amended Tex. Rev. Civ. Stat. Ann. art. 5547-204, §4.03, later codified at Tex. Health & Safety Code §531.002 (3), §534.054 (b) (Vernon 1992).

[6] Tex. Rev. Civ. Stat. Ann. art. 5547-204, §4.03 (b) (Vernon Supp. 1988).

performance of intake and referral services and diagnosis and evaluation ("D&E") services to help mentally retarded citizens find residential placement in San Angelo. CR 3173-3246, 3224, 3239, 345, 353.

Jan. 1989 TDMHMR designates CONCHO VALLEY as the "MRA" for Tom Green and nearby counties (CR 3112, Lentz aff.), making it the referral center for MHMR services. (CR 3106, Lentz aff.).

March 6, 1989 Marilyn Cochran and Robert Cochran's business, initially named Southwest Residential Services, Inc., requests letter of need, receives memo from CONCHO VALLEY's executive director JAMES YOUNG stating there is a need for 6-bed ICF/MR Level of Care V facilities in San Angelo.[7]

March 7, 1989 CONCHO VALLEY offers to sell workshop services to Southwest Residential Services. CR 3032, para. 20; CR 3038.

June 1, 1989 TDMHMR begins purchasing by annual contract CONCHO VALLEY's performance of placement services for state school campus residents wanting to move to homes in the community. SCR 248-254.

On or before June 1989 Marilyn and Robert Cochran's business, now incorporated as Concho Residential Service, Inc. ("CRS"), pays initial licensing and inspection fees to State for right to open its first ICF/MR home. CR 3028, para. 9; CR 473, para. 2.

June 1989 Under contract with State, CRS begins operating its first 6-bed ICF/MR home in San Angelo. CR 473-474, para. 2, 6.

June 1989 CRS notifies CONCHO VALLEY it has ICF/MR home open and available for referrals. (CR 3033, aff., para. 22).

June 1989 CRS's Marilyn Cochran meets with JOE FINN, Director of Mental Retardation Services for CONCHO VALLEY, to request referral services and workshop services.[8]

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[7] CR 3031-3032, para. 19; CR 3037; Cochran aff.

[8] Cochran aff., CR 475-476, par. 9-9f; CR 3032, par. 21.

... FINN offers both types of services **provided** CRS agrees to admit to its homes **only** PPP/CP persons who are referred by CONCHO VALLEY.

.... When Marilyn Cochran rejects that restriction, FINN says CONCHO VALLEY will provide workshop services to CRS but at double normal prices. Marilyn Cochran says she'll pay it. FINN says he'll double the price again. FINN says: "This is my territory. You can't just move into someone's territory. I'll break you."

June 16, 1989 CRS receives June 16 letter from JAMES YOUNG that promises to advise inquiring persons about CRS's homes but says the center has no "referral packets" it could send CRS.[9]

July 10, 1989 JAMES YOUNG's July 10 letter to CRS says workshop services will be offered but at higher prices Sept. 1.[10]

July 21, 1989 CONCHO VALLEY's JOE FINN sends memo that workshop is full and applicants must get on waiting list.[11]

July 25, 1989 CONCHO VALLEY signs July 25, 1989 MOU with CRS in which it promises to give referral packets to CRS.[12]

Summer 1989 When CRS's Cochran tries to examine referral packets at CONCHO VALLEY under supervision of Riggs, employee SHEPPARD tries to wrestle packets from Cochran's lap. CR 488-489, R. aff., para. 8.

Sept. 1989 TDMHMR purchases by annual contract CONCHO VALLEY's services to help consumers find placement in San Angelo.[13]

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[9] Cochran aff., CR 3033, para. 22; CR 3039.

[10] Cochran aff., CR 3033, para. 23, CR 3040.

[11] Cochran aff., CR 3034, para. 25; CR 3042-3043.

[12] Cochran aff., CR 3034, para. 26; CR 3044-3035.

[13] SCR 160-182, 193-198, 202-254.

1989-1990 JOE FINN orders CONCHO VALLEY employee Wanda Riggs to stop helping place people in CRS' homes. CR 488, Riggs aff. para. 7.

Nov. 1989 "Community" center CONCHO VALLEY ironically adopts residential services policy that refuses to admit into its homes mentally retarded citizens from the community (except on temporary respite basis) and admits only those in the specially-funded PPP/CCP class (generally, persons coming from state school campuses).[14] Such discrimination appears to violate federal law. CR 1348, §6.01.

1989-1991 JOE FINN repeatedly asks Abilene State School Supt. Bill Waddill for letter instructing CONCHO VALLEY it cannot give referral packets on clients to CRS.[15]

1989-1993 Occupancy statewide in community-based ICF/MR facilities continually exceeds 90%; long waiting lists.[16]

1989-1993 CRS' occupancy rate far below 90%.[17] CRS pays annual licensing fee to State on each of 5 ICF/MR homes. CR 3028, para. 9.

1990 CONCHO VALLEY's JAMES YOUNG pressures employee Wanda Riggs to resign because Riggs keeps telling inquiring persons about local providers such as CRS. CR 489, para. 9.

Feb. 1990 State contractually purchases CONCHO VALLEY case manage-

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[14] CR 489-490 (Riggs aff., para. 10d, 10e); CR 869 (CV 1st Req Adm #24), policy at CR 218, A (2), CR 215.

[15] Waddill depo., July 1996, CR 3297-3298; King depo., July 1992, CR 734-735; CR 742-743.

[16] CR 963 (last 2 para.); CR 1003; TXMHMR Strategic Plan: FY 1993-1998, SCR 126-128; CR 3029, Cochran aff., para. 12, 13.

[17] CR 3030, Cochran aff., para 14.

ment services for mentally retarded persons. CR 3115-3122, Csn. aff.

March 5, 1990 JAMES YOUNG tells Marilyn Cochran that Riggs won't lose job if CRS will contract with CONCHO VALLEY. CR 476, para. 10.

July 30, 1990 State (TDHS) begins purchasing under contract CONCHO VALLEY's performance of diagnostic services on potentially retarded persons. CR 3165-3172, SCR 193-198

August 1990 JAMES YOUNG tells Cochran state schools keep him from giving referral packets to CRS and he is "caught in the middle".[18]

Sept. 1990 TDMHMR purchases by annual contract CONCHO VALLEY's services to help consumers find placement in San Angelo.[19]

Dec. 21, 1990 TDMHMR instructs community centers to use state directory of ICF/MR facilities to make as much information as possible available to consumers about local resources.[20]

Dec. 31, 1990 JAMES YOUNG tells Marilyn Cochran he cannot control his subordinates when they refuse to give referral packets to CRS.[21]

March 1991 Marilyn Cochran is one of few private providers invited to meeting of MRA officials from across Texas.[22]

... TEXAS COUNCIL's SPENCER MCCLURE gives speech, suggesting that private providers must submit to the terms proposed by their local MRA.

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[18] CR 476, Cochran aff., para. 11.

[19] SCR 255-344, "Contract For Services Fiscal Year 1991"; SCR 160-161, Claiborne aff.

[20] CR 866 (CV's Admiss. #12); CR 463 (Fin. aff.).

[21] CR 476, Cochran aff., para. 12.

[22] Cochran aff., CR 3034-3035, para. 27.

... After speech SPENCER MCCLURE sits down next to Marilyn Cochran, which Cochran interprets as intimidation tactic.

April 1991 TDMHMR repeats directive to MRAs to use state directory of ICF/MR facilities to fully inform inquiring parties about available resources. (CR 465-467, Finc. aff.)

June 1991 TDMHMR faults CONCHO VALLEY's referral advice for "not consistently contain[ing] available alternatives for selection of services." CR 869, CV's Adm. #23, #22, #3.

1991 CONCHO VALLEY's 1991 Directory of Community Resources omits CRS from list of residential service providers. CR 874 (Adm. #51, #52).

Sept. 1991 TDMHMR purchases by annual contract CONCHO VALLEY's services to help consumers find placement in San Angelo.[23]

April 1992 CRS sues CONCHO VALLEY et al.

April 1993 CONCHO VALLEY's initial 1993 Directory of Community Resources omits CRS. CR 874-875 (CV's Admis. #53, #54).

May 1995 TEXAS COUNCIL's MCCLURE, CREWS testify before Senate committee as only proponents for HB 553, which would give community MHMR centers blanket exemption from state antitrust law. CR 477-478, para. 16. Bill passes but with amendment negating exemption.

Record Of Raising Federal Questions

Raising Question #1. Petitioner argued that the Local Government Antitrust Act of 1984 does not exempt local government activities from federal antitrust laws, but rather limits the remedy for violations to injunctive relief. At the trial level petitioner raised this in "Plaintiff's First Amended Response To Defendants' Motions For Summary Judgment", CR, 283-284; at the appellate level in "Brief Of Appellant", pp. 62-63; and "Motion For Rehearing

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[23] (SCR 345-446, "Performance Contract Fiscal Year 1992"; SCR 160-161, Claiborne aff.)

Of Appellant," at p. 4. Texas' Third Court of Appeals ruled that the LGAA of 1984 "expressly immunizes all local governmental entities from antitrust liability under the Clayton Act." Appendix, at p. 26.

Raising Question #2. Petitioner argued that the State's regulation is insufficient to satisfy the *Parker* "state action" test, that Texas does not authorize community centers to regulate placement of consumers nor does Texas give centers monopoly power over the placement decision, which is up to the consumer and the consumer's family. Texas merely gives centers monopoly power over the market for information about available services. "Plaintiff's First Amended Response To Defendants' Motions For Summary Judgment", CR, 295-299; and "Brief Of Appellant", p. 65, part 20. Texas' Third Court of Appeals found that sufficient state action existed, based on the most general of conclusions. Appendix, 21, 24-25.

Raising Question #3. Petitioner argued that CONCHO VALLEY is not a state entity but rather an unincorporated association of local entities, and is deemed by statutory legal fiction to be an "agency of the state" merely as a means of making the Texas Tort Claims Act apply to it, and that its designation by the state agency TDMHMR as a "mental retardation authority" was a contractual status that could be given to a private organization. Petitioner argued this at the trial level in "Plaintiff's First Amended Response To Defendants' Motions For Summary Judgment", CR 264-266, and in "Brief Of Appellant", pp. 36-38, 51-53. Texas' Third Court of Appeals ruled that community MHMR centers are "agencies of the state" and applied the *Parker* "state action" test for state actors instead of applying either of the stricter tests for municipal actors or private actors. Appendix, 25.

Raising Question #4. Petitioner argued that the Texas Antitrust Act does not incorporate the federal *Parker* "state action" exemption, and that federal medicaid law mandates a consumer's right to choose from qualified providers without improper government interference. Petitioner argued this at the trial level in "Plaintiff's First Amended Response To Defendants' Motions For Summary Judgment", CR, 284-286, 269-270; in "Brief Of Appellant", pp. 63-64, 57-58; and in "Motion For Rehearing Of Appellant." Texas' Third Court of Appeals ruled that the Texas Antitrust Act adopts the *Parker* "state action" exemption, Appendix, at p. 24, and never discussed freedom of choice under federal and state medicaid law.

Raising Question #5. Petitioner pleaded that CONCHO VALLEY was not a lawful community center and that the principals who participated in the association had never signed the contract required by law to establish a center. "Plaintiff's Fourth Amended Petition," CR 1402, 1408-1413. In the summary judgment proceeding petitioner pleaded that fact issues existed regarding whether a contract had been signed to create CONCHO VALLEY and whether the principals had made a colorable, good faith effort to establish CONCHO VALLEY. "Plaintiff's First Response To Defendants' Second Round Of Motions For Summary Judgment," CR 2994-2999. Petitioner argued in its trial brief that due process required an ascertainable procedure for establishing community centers, "Plaintiff's Brief Supporting Plaintiff's Responses to Defendants' Second Round of Summary Judgment Motions," p. 9, and in its "Brief of Appellant", p. 77, filed with the Third Court of Appeals. The Third Court of Appeals did not discuss the due process issue when it held that the enabling statute did not require a written contract to establish a center. Appendix, 27.

ARGUMENT

Recent scholarship suggests public enterprises can be more dangerous antitrust violators than private firms. Two scholars[24] at the American Enterprise Institute-Brookings Joint Center For Regulatory Studies opine:

> We have shown that a public enterprise may have greater incentive to engage in anticompetitive practices and circumvent antitrust laws than its private counterpart. Therefore, more stringent antitrust laws and harsher penalties for violating these laws may be appropriate for public enterprises.

D. Sappington and J. Sidak, *Incentives for Anticompetitive Behavior by Public Enterprises*, AEI-Brookings Joint Center For Regulatory Studies, Working

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[24] David E.M. Sappington is the Lanzillotti-McKethan Eminent Scholar, Department of Economics, University of Florida. J. Gregory Sidak is a Senior Lecturer at Yale School of Management and the F.K. Weyerhaeuser Fellow in Law and Economics, American Enterprise Institute for Public Policy Research.

Paper 99-11 (AEI Nov. 1999), at 24.[25] They continue:

> A reduced focus on profit was shown to lead the public enterprise to price certain products below cost, to raise the costs of existing rivals, to erect entry barriers to preclude entry by potential rivals, and to understate and adopt inefficient production technologies in order to circumvent regulations designed to foster competition. Each of these activities can preclude the operation of more efficient competitors, and thereby reduce social welfare.

At 22. They observed even more recently:

> [I]n the case of a public enterprise, the plausibility of predation grows and presents a paradox: the firms that may most deserve the government's scrutiny with respect to predation are the government's own enterprises.
>
> Quite often, the less concerned the public enterprise is with profit, the stronger are its incentives to undertake activities that disadvantage the competition.
>
> [P]redation may take many forms other than predatory pricing, such as misleading advertising about a competitor's product, cutting off supply of an essential input, designing interfaces for complementary products in a way that produces incompatibility for a rival, or initiating excessive regulatory hearings or lawsuits. ... For discussion of these nonprice methods of predation, see Robert H. Bork, *The Antitrust Paradox: A Policy At War With Itself* 347-64 (Free Press rev ed 1993) ... .

D. Sappington and J. Sidak, *Are Public Enterprises the Only Credible Predators?* (Book Review), 67 U.Chi.L.Rev. 271, 272, 284, 290, 291, 292 (2000). John R. Lott, Jr., the John M. Olin Law And Economics Fellow at the University of Chicago, concurred in 1999:

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[25] Available online at http://www.aei.brookings.org/publications /working/working_99_11.pdf> (visited Mar 10, 2000), at 24.

> [T]he social costs of public ownership may be substantially greater than previously believed. Predatory commitments by public enterprises are more credible ... [A]ny size public enterprise can be predatory.
>
> [W]hat is not recognized is that precisely because public enterprises are motivated by goals such as output maximization, rather than profit maximization, public enterprises face higher returns to predation. ...
>
> Several reasons why public enterprises would maximize output have been advanced. ... A larger output can raise salaries, open greater opportunities for consulting or contracting with the agency after retirement ... and increase the prestige that comes from being associated with a larger agency.
>
> Finally, by eliminating private competitors, public enterprises may reduce the political opposition to their receiving increased subsidies. ... The organized political opposition to legally imposed entry barriers for private enterprises may also be reduced.

J. Lott, Jr., *Are Predatory Commitments Credible: Who Should The Courts Believe* (1999) 61, 63, 68, 73.

Economic inefficiency in supplying MHMR services is far more devastating to consumers than inefficiency in supplying widgets. ICF/MR services are a scarce resource, but when provided, protect the mentally retarded from sexual assault and physical abuse, meet their nutritional, medical, and hygienic needs, and give them a life.

Defendants' acts denied mentally retarded citizens these vital services in three ways: citizens on waiting lists were denied access to CRS' five opened homes, CRS was financially unable to open more homes, and fewer citizens were served statewide because CRS' low-occupancy raised the State's per-resident cost of funding ICF/MR. Further, statewide efficiency was harmed because without more CRS homes the ratio of efficient private ICF/MR homes to inefficient government operated homes was lower.[26] Efficiency cannot be

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[26] Cochran aff., CR 474, par. 8; CR 3030, par. 15-16.

achieved if community centers, in their clearinghouse role, do not inform consumers of the private ICF/MR homes available.

Perhaps anticipating that the distinction between private and public enterprise would continue to blur, Texas framed the Texas Free Enterprise and Antitrust Act of 1983[27] to expressly extend to all public enterprises ("any ... public or private group, however organized") except cities and the State, its departments, and administrative agencies.[28] As such, Texas' Antitrust Act applies to community MHMR centers, the counties that form and fund them, and private parties with whom they combine to restrain trade.

Texas' Antitrust Act scrutinizes local public enterprises' actions more closely than federal law does. It exempts their anticompetitive conduct only if it is "required or affirmatively approved" by state or federal law.[29] This is much stricter than the "state supervision" test of *Parker v. Brown*.[30]

Defendants' restraints on trade, far from being "required or affirmatively approved" by law, directly contravened state and federal MHMR law and rules that require full disclosure of available residential facilities and mandate freedom of choice without improper government interference.

The Texas Antitrust Act's scrutiny of public enterprises is not diluted by federal law. It specifies that federal judicial interpretations shall be followed only to the extent they promote competition in goods and services to benefit consumers.[31] That limitation spurns federal interpretations that allow anticompetitive behavior, chief of which are judicially-crafted exemptions such as the *Parker* "state action" doctrine.

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[27] Texas Free Enterprise and Antitrust Act of 1983, 68th Leg., R.S., ch. 519, 1983 Tex. Gen. Laws 3010, codified at Tex. Bus. & Com. Code §15.01 et seq. (West 1994).

[28] Tex. Bus. & Com. Code, §15.03 (3), §15.05 (a), (b) (West 1994) (Apndx J).

[29] Tex. Bus. & Com. Code,1 §15.05 (g) (West 1994).

[30] *Parker v. Brown*, 317 U.S. 341, 352, 63 S.Ct. 307, 314 (1943).

[31] Tex. Bus. & Com. Code, §15.04 (West 1994).

QUESTION #1. Local Government Antitrust Act of 1984 Misinterpreted, Merely Limits Remedies. Petitioner respectfully submits that the Local Government Antitrust Act of 1984, 15 U.S.C.A. §§ 34-36 (West 1997), does not exempt local government activities from federal antitrust law, but rather limits the remedy available when their activities violate antitrust law. It bars recovery of damages, interest on damages, costs or attorney's fees. Injunctive relief is not barred. Texas' Third Court of Appeals erred in holding that the LGAA exempts activities, and therefore exempts Texas counties, such as Tom Green County, from antitrust scrutiny (Appendix, 26).

Moreover, the Third Court of Appeal's alternate ruling (Appendix, 26), that Tom Green County was immunized by Texas' "state action" exemption in Texas' antitrust act, is wrong. Texas' narrowly-drawn "state action" exemption immunizes actions only if they are "required or affirmatively approved" by state or federal law:

> .... Nothing in this section shall apply to actions required or affirmatively approved by any statute of this state or of the United States or by a regulatory agency of this state or of the United States duly acting under any constitutional or statutory authority vesting the agency with such power.

Tex. Bus. & Com. Code §15.05 (g) (West 1994). The argument on Question #4 below shows that CONCHO VALLEY's injurious conduct violated state and federal law and policy; it was neither required nor approved. As a controlling principal Tom Green County is vicariously liable for the antitrust violations of its unincorporated association CONCHO VALLEY.

QUESTION #2. Insufficient *Parker* Inquiry By State Courts. One element of the *Parker* "state action" doctrine must be the level of inquiry required of a court. Since "state action" immunity is disfavored , F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992), the bar should be set higher. Because a "state action" finding in this case would immunize wrongful conduct that injures **disabled** citizens, perhaps the bar should be raised even further.

Petitioner respectfully submits that the state courts did not manifest sufficient inquiry or explanation of the finding of *Parker* "state action". The inquiry and explanation were inadequate as a matter of due process,[32] as a

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[32] U. S. Const. amend. V, XIV.

matter of the threshold for invoking a disfavored immunity, and as a matter of providing disabled citizens with access to judicial resources.

The trial court made no findings regarding "state action". The Third Court of Appeals never discussed whether the state has any practical control or effective enforcement authority over a community MHMR center that violates the law in the manner chronicled in the Chronology above at 2. The Court did not discuss consumers' dependence on the community center for information about available facilities, the role of consumers and their families in selecting a facility under medicaid's freedom of choice law, or the fact that federal and state laws and policies require community centers to fully inform consumers of available facilities. With all due respect, petitioner submits that the court of appeals was impermissibly casual and vague in finding sufficient state action to excuse the wrongful antitrust conduct. Appendix, 21, 24-25.

Even the Third Court of Appeals may lack confidence in its findings. Although its lengthy opinion (Appendix, 20-34) established more new rules of law governing the Texas Free Enterprise and Antitrust Act of 1983 than any reported case in that Act's 17-year history, and though creating new law is the cardinal criterion for publishing Texas opinions, T.R.A.P. 47.4 (a), the court ordered that it not be published (Appendix, 34).

Since petitioner is proceeding under a "private attorney general" statute (the Texas Antitrust Act provides for treble damages, Appendix, 7) which benefits consumers of mental retardation services, the Americans With Disabilities Act ("ADA") may apply. Innovative Health Systems v. City of White Plains, 117 F.3d 37, 46-47 (2nd Cir. 1997). The ADA expressly recognizes that disabled citizens have been relegated to a position of political powerlessness in our society and often have had no legal recourse to redress discrimination with respect to their access to public services and their relegation to lesser services. 42 U.S.C.A. §12101 (a) (3), (4), (5), (7). The ADA directs that disabled citizens not be denied the benefits of a public entity's services and activities. 42 U.S.C.A. §12132. This should extend to a state appellate court's judicial effort and expertise in writing opinions and willingness to publish them.

QUESTION #3. Legal Fiction Cannot Guide "State Action" Test. Petitioner respectfully submits that Texas' Third Court of Appeals wrongly stated the *Parker* "state action" doctrine as requiring the "state actor" test where one is a "state actor" only by legal fiction. The court should have stated that the "municipal actor" test, which it noted carries a higher burden (Appendix, 25) or the "private actor" test, is required, because CONCHO

VALLEY, objectively, is a local organization and its MRA status and referral and placement duties are contractual and conferrable on private entities.

In 1979 community MHMR centers were deemed by statutory legal fiction "an agency of the state and a unit of government"[33] to make the Texas Tort Claims Act apply to them. That should be no more dispositive of their true nature than the other amendments to the community MHMR center enabling act which stipulate a center shall be considered "a governmental unit, and a unit of local government" (1987[34]), and "a local government" and "a political subdivision" (1997[35]). Such contradictory designations can only co-exist as legal fictions imposed for **limited** statutory purposes.

Objectively, a lawfully-organized community MHMR center is an unincorporated association of the government agencies that choose to establish and operate it. The Texas AG has opined that a center is a "component part" of the local governments that create it, and the local governments can be liable for the torts of the center's agents.[36] Like typical associations,[37] the principals establish it and appoint persons to manage it.

Under the original 1965 community center enabling act,[38] a host of governmental agencies could be principals in the community center. The list was shortened in 1969 to include only municipalities, counties, hospital

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[33] Act of May 24, 1979, 66th Leg., R.S., ch. 797, §1, 1979 Tex. Gen. Laws 2028, applying Texas Tort Claims Act to centers.

[34] Act of June 1, 1987, 70th Leg., R.S., ch. 956, §3.01, 1987 Tex. Gen. Laws 3212, applying Interlocal Cooperation Act, et al.

[35] Act of May 25, 1997, 75th Legis., R.S., ch. 835, §1, 1997 Tex. Gen. Laws 2676, applying laws regarding bonds, insurance risk pool for employees.

[36] Op. Tex. Att'y Gen. Nos. M-538 (1969), at 3-4; H-375 (1975) summary at 3.

[37] Oil Lease & Royalty Syndicate v. Beeler, 217 S.W. 1054, 1057 (Tex. Civ. App.-Dallas 1920, writ ref'd).

[38] Mental Health And Mental Retardation Act, 59th Leg., R.S., ch. 67, §3.01 (a), 1965 Tex. Gen. Laws 171.

districts, and school districts.[39] Unlike the political subdivisions and bodies politic that establish it, a community center is not a distinct, self-supporting entity. As a classic unincorporated association, it is statutorily configured to depend on its principals for direction and support:

(1) the enabling act speaks of a center generally as an "organizational combination"[40] and conspicuously omits declaring it a "body politic" or "corporate body",[41]

(2) centers lack the means to be distinct political subdivisions[42] since

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[39] Act of May 21, 1969, 61st Leg., R.S., ch. 688, §3, 1969 Tex. Gen. Laws 2012; codified at Tex. Health & Safety Code Ann. §534.001 (a) (Vernon 1992).

[40] Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.01 (a) (Vernon Supp. 1988); recodified at Tex. Health & Safety Code Ann. §534.-001 (a) (Vernon 1992) and also at Act of May 26, 1991, 72nd Leg., R.S., ch. 569, §3, 1991 Tex. Gen. Laws 2016, amending art. 5547-203, §3.01 (a).

[41] Contrast this to general law and special law **municipalities** being "**incorporated**", Tex. Loc. Gov't Code Ann. §§5.001, 5.002, 5.003, 5.901, 5.903, 6.001, 6.002, 6.003, 6.011, 7.001-7.008, 8.001-8.006, home-rule municipalities being "**a body politic**", Tex. Loc. Gov't Code §51.074, **counties** being "**legal subdivisions** of the State,"Tex. Const. art. XI, §1, and "**a corporate and political body,**" Tex. Loc. Gov't Code Ann. §71.001, **conservation and reclamation districts** being "**bodies politic and corporate**", Tex. Const. art. XVI, §59 (b), **hospital district boards** in counties of 75,000 or less being "a **corporate body**", Tex. Health & Safety Code Ann. §282.041 (b), an **emergency services district** "**a political subdivision**", Tex. Health & Safety Code Ann. §775.031 (a).

[42] Tax authority is a defining attribute of political subdivisions. Guaranty Petroleum Corporation v. Armstrong, 609 S.W.2d 529, 530 (Tex. 1980) (political subdivision can assess, collect taxes); Bolen v. Board of Firemen, Policemen and Fire Alarm Operators' Trustees, 308 S.W.2d 904, 905 (Tex. Civ. App.-San Antonio 1957, writ ref'd) (political subdivision contemplates geographical bound-

they have no tax authority,

(3) the local governments' role is permanent - after they "establish" the community center they are to "operate"[43] it and are "participating" agencies (see fn 46 below),

(4) the local governments are given the means to "operate" the center, because they appoint the governing board (and can appoint themselves)[44] and only they can donate tax revenue to the center,[45]

(5) local governments could not constitutionally donate funds to their center if it were legally separate from them, [46]

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aries, public elections, public officials, taxing power and a general public purpose or benefit).

[43] "[E]stablish and operate", Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.01 (a) (Vernon Supp. 1988), now at Tex. Health & Safety Code Ann. §534.001 (a) (Vernon 1992) and at Act of May 26, 1991, 72nd Leg., R.S., ch. 569, §3, 1991 Tex. Gen. Laws 2016, amending art. 5547-203, §3.01 (a).

[44] Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.02 (b) (Vernon Supp. 1988), recodified at Tex. Health & Safety Code Ann. §534.-003 (Vernon 1992) and also at Act of May 26, 1991, 72nd Leg., R.S., ch. 569, §4, amending Tex. Rev. Civ. Stat. Ann. 5547-203, §3.02 (c).

[45] Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.09 (Vernon Supp. 1988), recodified at Tex. Health & Safety Code Ann. §534.-019 (Vernon 1992) and also at Act of May 26, 1991, 72nd Leg., R.S., ch. 569, §4, 1991 Tex. Gen. Laws 2015, 2021, amending Tex. Rev. Civ. Stat. Ann. 5547-203, §3.09.

[46] Under Tex. Const. art. III, §52 a transfer of moneys between political subdivisions is illegal unless the donee is **contractually obligated** to spend the funds on governmental purposes of the donor. San Antonio River Authority v. Shepperd, 299 S.W.2d 920, 927-928 (Tex. 1957) (county's transfer of funds to river authority pursuant to contract which bound river authority to construct specific flood control facilities was legal); Harris County Flood Control Dist. v. Mann, 140 S.W.2d 1098, 1104 (Tex. 1940)

(6) the community center's board must annually submit to each participating local government a request for funds or in-kind assistance,[47]

(7) organizing the community center does not relieve the county of its statutory duty to care for the mentally retarded,[48]

(8) local governments are not required to establish or participate in a community MHMR center (community MHMR centers have **not** been created in many Texas counties[49]), and

(9) community centers are not mandated by the State to provide mental retardation services.[50]

Moreover, CONCHO VALLEY admitted (i) it is not listed in the legislature's biennial appropriations acts as a state agency or state department, (ii) does not pay its employees out of state bank accounts with state warrants, (iii) does not use the state seal on its letterhead, and (iv) does not have officers or board members appointed by the Governor. (CR 870-871, Adm. #29-32).

Agreeing to be a MRA or "designated provider" does not make CONCHO VALLEY a state agency. The State of Texas' operation of state school campuses for mentally retarded persons, and counties' caring for "idiots

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(county's funding of flood control district violates ban on public gifts).

[47] Act of May 26, 1991, 72nd Leg., R.S., ch. 569, §4, 1991 Tex. Gen. Laws 2015, 2019 (Appendix J), adding §3.03 (b) to the Mental Health And Mental Retardation Act (Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.03 (b). This Act was enacted subsequent to the 1991 recodification of the MHMR Act in the Texas Health & Safety Code §531.001 et seq.

[48] Tex. Health & Safety Code Ann. §615.001 (Vernon 1992).

[49] TXMHMR Strategic Plan - Fiscal Years 1993-1998, SCR 80, last para.

[50] State law requires a community center to provide mental health, but not mental retardation, services. Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.12 (b), (c) (Vernon Supp. 1988); now Tex. Health & Safety Code §534.016 (Vernon 1992).

and lunatics" who could not be admitted to State facilities,[51] are mandated by the State and are acts of the sovereign.

However, the provision of mental retardation services in the community by community MHMR centers and private organizations has been structured far differently. These community services have been provided in a more businesslike manner, with community MHMR centers and private providers signing contracts with the State pursuant to which the State pays them to provide services to mentally retarded individuals.[52]

In the case of CONCHO VALLEY, its "sovereign" funding, meaning tax revenue that it received from its sponsoring government entities, was 3.7% of its total revenue in FY 1990 and 3.3% in FY 1991.[53] Most of its revenue was received as contractual payments for contractual services it performs.[54] CONCHO VALLEY did not seem to want to help those consumers who did

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[51] Formerly Tex. Rev. Civ. Stat. Ann. art. 2351, now codified at Tex. Health & Safety Code Ann. §615.001 (Vernon 1992).

[52] See multiple, voluminous contracts between CONCHO VALLEY, on one hand, and TDMHMR and TDHS, on the other. TDMHMR, broad range of MHMR services, 1988-1989, CR 3173-3246, 3253; TDMHMR, PPP/CP services, 1989 forward, SCR 249-254; TDHS, case management, 1990 forward, CR 3115-3122, 1199-1206; TDHS, Diagnostic Services, 1990 forward, CR 3165-3172, SCR 193-198; TDMHMR, broad range of MHMR services, 1990-1993, SCR 162-254, 255-342, 345-446, 448-533.

[53] CONCHO VALLEY's budget for FY 1990 shows $3,430,920 of revenue that includes $128,050 of city and county tax funds. SCR 164. FY 1991 budget shows $3,792,022 of revenue including $128,050 of city, county tax funds. SCR 310.

[54] For example, CONCHO VALLEY's FY 1991 general contract with TDMHMR was for $1,951,334, which was roughly half of CONCHO VALLEY's $3,792,022 total revenue. SCR 261-262, 310. CONCHO VALLEY's FY 1990 general contract with TDMHMR was for $1,658,835, out of CONCHO VALLEY's $3,430,920 total revenue. SCR 207, 164.

not generate lots of funding.[55]

Accepting designation by TDMHMR as a "mental retardation authority" ("MRA") or "designated provider" is a voluntary, contractual status, not a governmental one.[56] It is given to a provider that contracts with TDMHMR to provide MHMR services in the local area.[57] From 1988 through 1996 a community MHMR center had the right of first refusal with respect to being designated an MRA and designated provider and receiving the associated state contracts for its region.[58] If the community center declined the contracts or defaulted, however, TDMHMR could give the contracts, MRA status, and "designated provider" status to non-governmental organizations.[59]

Contracting with the State does not make one a state agency. Petitioner CRS operated under state ICF/MR contracts (CR 473-474), state standards and inspections, but was not a state entity. That contracts required an MRA to follow State regulations and policies is no different.

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[55] CR 490-491, para. 10e, 13 (Riggs aff.).

[56] Tex. Health & Safety Code Ann. §531.002 (9) (Vernon 1992); Tex. Rev. Civ. Stat. Ann. art. 5547-201, §1.02 (14) (Vernon Supp. 1988).

[57] Tex. Health & Safety Code Ann. §533.034, §533.035, §534.054 (c) (Vernon 1992); Act of May 24, 1991, 72nd Leg., R.S., ch. 569, §10, 1991 Tex. Gen. Laws 2024, amending art. 5547-204, §4.03 (c); Tex. Rev. Civ. Stat. Ann. art. 5547-204, §4.03 (b) (Vernon Supp. 1988).

[58] The statutory preference given community centers was repealed effective Sept. 1, 1997. Act of May 24, 1997, 75th Leg., R.S., ch. 869, §5, 1997 Tex. Gen. Laws 2787, repealing Tex. Health & Safety Code §534.054 (b).

[59] Act of May 26, 1991, 72nd Leg., R.S., ch. 569, §10, 1991 Tex. Gen. Laws 2024 (Appendix J), amending art. 5547-204, §4.03 (d); Tex. Health & Safety Code Ann. §534.054 (c), §534.064 (Vernon 1992); Tex. Rev. Civ. Stat. Ann. art. 5547-204, §4.03 (b) (Vernon Supp. 1988).

QUESTION #4. Parker "State Action" Doctrine Not Incorporated Into Texas Antitrust Act. Petitioner respectfully submits that Texas' Third Court of Appeals lacked a colorable basis for its conclusion that §15.04 of the Texas Free Enterprise & Antitrust Act of 1983 incorporates the federal *Parker* "state action" doctrine. The ruling would turn federalism on its head and would immunize CONCHO VALLEY against damages liability for its brazen violation of federal medicaid law's "freedom of choice" requirement.

The Texas Free Enterprise and Antitrust Act of 1983 adopts federal judicial interpretations only if they promote competition in trade and commerce in Texas and provide the benefits of that competition to consumers. Tex. Bus. & Com. Code §15.04 (West 1994) states:

> The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state. The provisions of this Act shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose. (underlining added)

That qualification in §15.04 excludes federal interpretations that sanction anticompetitive behavior, such as the *Parker* "state action" doctrine and other federal exemptions from the antitrust laws. The state appeals court inexplicably ignored this language. Incorporating *Parker* would harm economic competition and consumer welfare because it closes its eyes and permits anticompetitive, anti-consumer behavior. It does so not for economic good but out of deference to state sovereignty. F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992) (The only federal interpretation relating to exemptions that would be incorporated by §15.04 is the doctrine that antitrust exemptions are construed narrowly,[60] since it minimizes the areas where anticompetitive practices are tolerated.)

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[60] Federal courts narrowly interpret both statutory and implicit exemptions from the federal antitrust statutes. Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979). Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 11-12, 13 (1976).

Moreover, §15.04 merely calls for "harmony" with federal interpretations of comparable statutes. Since the *Parker* doctrine is based on a national government's deference to state sovereignty which a state does not owe itself, "harmony" with *Parker* does not require a State to adopt it. The most reasonable view of the Texas Legislature's intent is that it intended to adopt, not the federal *Parker* doctrine, but a "state action" doctrine doctrine of its own formulation: comprehensive, easy to apply, and drafted from a state perspective. The 68th Legislature did this in §15.05 (g), quoted earlier, exempting "actions required or affirmatively approved ..." by lawful statute or regulatory agency. Far less reasonable is the state appeals court's idea that the Legislature, after adopting its own "state action" doctrine, would (1) redundantly incorporate another "state action" doctrine (2) which is more awkward and tedious for courts to apply and (3) springs from the national government's deference toward co-sovereign states Texas does not owe itself.

Incorporating *Parker* into the Texas Antitrust Act would terribly weaken private enforcement of the medicaid requirement that consumers be free to choose their service provider without improper government interference. Since 1967 medicaid has required that States ensure a consumer's **right to choose among a range of qualified providers without government interference**. 42 USC §1396a (23); 42 CFR §431.51 (b) (1). In Briarcliff Haven, Inc. v. Dept. of Human Resources of Georgia, 403 F. Supp. 1355, 1362 (N.D. Ga. 1975) the Court stated:

> The "free choice of provider" requirement is designed to assure each Medicaid recipient a free choice among qualified providers of medical assistance and to guarantee that the state will not dictate to any Medicaid recipient where he or she must receive treatment.

Cf., Linton By Arnold v. Carney By Kimble, 779 F. Supp. 925, 936 (M.D. Tenn. 1990). The U.S. Supreme Court echoed this view in O'Bannon v. Town Court Nursing Center, 447 US 773, 785, 65 L.Ed.2d 506, 100 S.Ct. 2467, 2475 (1980), stating that this part of the medicaid law:

> "[G]ives recipients the right to choose among a range of qualified providers, without government interference."

Since 1979 Texas medicaid law has also mandated a consumer's right to

choose any provider authorized by TDHS to provide medicaid services.[61] Texas' Intermediate Care Facility/Mentally Retarded ("ICF/MR") program is financed mainly by medicaid. CR 491 para. 14-15. Most residential services for mentally retarded Texans are provided in ICF/MR facilities.[62] Texas medicaid paid $536.3 million to ICF/MR facilities serving 13,946 consumers in 1993. CR 550. TDHS directed the ICF/MR program from 1989-1993. CR 530, CR 474 para. 6.

Consumers are denied freedom of choice if they are not told who the available providers are. A center may advise regarding what are appropriate services for the consumer's needs, but must also advise who are the available providers of such services.

TDMHMR Memorandum. TDMHMR's Deputy Commissioner Jaylon Fincannon, in a 1990 Memorandum directed community centers to inform consumers and their families of all available ICF/MR facilities:

"Texas Department Of Mental Health and Mental Retardation

MEMORANDUM

December 21, 1990

TO: Superintendents, State Schools
Directors, State Centers
Executive Directors, MHMR Centers

FROM: Jaylon Fincannon,
Deputy Commissioner, Mental Retardation Services

SUBJECT: Information For Families Concerning Alternate Living Facilities

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[61] Tex. Hum. Res. Code Ann. §32.027 (a) (Vernon's 1993). Exceptions not relevant to the ICF/MR program were added, eff. Sept. 1, 1993, id. (Vernon's 1994). The State Medicaid Office of the Texas Health & Human Services Commission notes: "Clients must be allowed to use any Medicaid health care provider meeting program standards." Texas Medicaid In Perspective, May 1994, CR 525. Cf. The Texas Medicaid Plan, §4.10 (a).

[62] CR 550, Texas Medicaid In Perspective, May 1994.

Attached is a listing of certified ICF/MR facilities by county for your information and use. You should use this information as a reference as you consider alternate placement of individuals so recommended by your interdisciplinary teams. I am also asking that you provide this information to families of persons recommended for alternate placement. This information should also be provided to family members who you come in contact with through your Intake and Referral or public information services. The intent is to make as much information as possible available to persons who are considering such a decision so that they may be aware of all available resources.

This list is not to be considered as an endorsement for any particular facility. The actual referral of individuals and their families to a specific facility or facilities should be done on an individualized basis for the person needing the services.

We will be updating this list on a quarterly basis so that you may have the best information possible as you respond to persons with mental retardation , their families or other persons who seek information about alternate living arrangements in Texas. If other data could be added to this listing which would make it more useful, please contact Carole Smith at (512) 323-3261."

CR 461, 463, 466.

TDHS medicaid contracts. In contracting to provide medicaid services such as case management and diagnostic services[63], community centers promised to give consumers freedom of choice in selecting providers of services. CONCHO VALLEY signed two such contracts with TDHS in 1990, one to provide diagnostic and evaluation services to potentially retarded persons,[64] the other to provide case management services to mentally retarded persons.[65] The contracts (p. 3, para. 20; p. 4, para. 20) state: "[CONCHO VALLEY agrees] [t]hat all Medicaid recipients must be afforded freedom of choice unless otherwise limited by TDHS or TDHS' designee in selecting

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[63] CR 631, Texas Medicaid In Perspective, May 1994, definition of community MHMR centers.

[64] SCR 193, 195, CR 3165, 3169 (Carson aff.).

[65] CR 1199, 1204, CR 3115, 3120 (Carson aff.).

services and/or a provider of services and that services must be accepted voluntarily by Medicaid recipients." CONCHO VALLEY also agreed "to participate in any Texas Medicaid program applicable to ... mentally retarded persons, unless released from participation by TDMHMR in writing."[66] This would obligate it to cooperate with ICF/MR providers such as CRS.

TDMHMR's contractual "Community Standards". In its state contracts[67] CONCHO VALLEY agreed to follow the "TDMHMR Community Standards for Mental Retardation Services", which TDMHMR issued in 1988 ("TDMHMR Community Standards"). The TDMHMR Community Standards (CR 323 et seq.) repeatedly require community centers to fully inform consumers of all services available in the community. Relevant portions are excerpted in CRS' SJM response at CR 277-279 and can be examined in the Document itself at CR 329, 337-338, 341, 345, 436, 328, and 353.

TDMHMR's contractual case management rules. CONCHO VALLEY also contractually agreed to follow TDMHMR's case management rules which emphasize consumer choice. The relevant contract and excerpts from the rules are identified in CRS' SJM response at CR 279-280.

Question #5. CONCHO VALLEY Did Not Satisfy Minimum Due Process To Become A Lawful Community Center. Before an organization can claim a public charter and clothe itself with government immunity as a defense to injuring citizens, due process requires that minimum formative procedures be followed. Petitioner respectfully submits that MHMR Services For The Concho Valley did not fulfill such minimum requirements.

Texas' 1965 enabling legislation for community MHMR centers required a written contract between eligible founders as the cognizable, documentable article establishing a community center. None was ever executed or even discussed for MHMR Services For The Concho Valley.

Texas' Third Court Of Appeals says a written contract was not required by the statute (Appendix, 27), but that would void the statute for

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[66] "Contract For Services FY 1991" between TDMHMR and CONCHO VALLEY, at SCR 286, section M.

[67] See CONCHO VALLEY's general services contract with TDMHMR for FY 1990 (SCR 203-204, para. B.2. c.), and its PPP/CP contract with TDMHMR (SCR 250 para. #3) which began June 1, 1989 (SCR 250).

vagueness. It would deprive the law of an ascertainable standard for determining whether a community center had been established.

A. **Enabling Act plainly requires written contract**. The enabling act for community MHMR centers was adopted in 1965, as part of the Mental Health And Mental Retardation Act ("the Act") that created TDMHMR.[68] The enabling act contemplated that local agencies would establish the community center by written agreement. The center would then formulate a plan for serving its region, and then send the agreement and plan to TDMHMR to qualify for state grants. §3.01 (a) of the Act provided:

> One or more [local agencies] may **cooperate, negotiate, and contract with each other through their governing bodies to establish** and operate a center. (bolding added)

§4.01 made clear that the contract was to be in writing:

> As soon as possible after its **establishment**, a community center shall formulate and submit to the Department: (1) a copy of the **written agreement between the participating local agencies**; (2) a plan ... to ... make available to the residents of the region a full range of ... services.... (bolding added)

The only "written agreement" that §4.01 could be referring to was the "contract" called for in §3.01 to establish the community center. The Act provided for no other written agreement between the local agencies. A statute should be construed as a whole rather than through an examination of isolated provisions, and it should be read as if every word and phrase were deliberately chosen for a purpose. ADP Credit Corp. v. Sharp, 912 S.W.2d 490, 493 (Tex. App.-Austin 1996, writ denied).

B. **Using written contract was not optional**. §3.01 used "may" instead of "shall" to make whether to establish a center optional. Contracting was not optional. Making it so would void the statute for vagueness because it gives agencies no other measurable means to establish a center.

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[68] Mental Health And Mental Retardation Act, 59th Leg., R.S., ch. 67, 1965 Tex. Gen. Laws 165-174, initially codified at Tex. Rev. Civ. Stat. Ann. art. 5547-201 et seq.

C. **Governing body approval of contract**. §3.01 required that the contract be made through the governing bodies. This assured a paper trail of intent. A city or county may contract only on express authorization of the city council or commissioners court by vote reflected in the minutes. City of Bonham v. Southwest Sanitation, 871 S.W.2d 765,767 (Tex. App.-Texarkana 1994, writ denied).

D. **Due process requires ascertainable procedure**. If the statute fails to specify an ascertainable procedure for creating a community center, it would be void for vagueness under the due process protection of U.S. Const. amend. V, XIV. Government statutes must be definite and certain to be valid. Lone Star Gas Co. v. Kelly, 165 S.W.2d 446, 448-449 (Tex. 1942); Sanders v. State Dept. of Public Welfare, 472 S.W.2d 179, 182, 185 (Tex. Civ. App.-Corpus Christi 1971, writ dism'd). Without a definite standard ,one cannot know whether a good faith, colorable effort has been made to comply.

E. **No colorable, good faith effort to conform to enabling act**. There is no evidence of a good faith, colorable attempt in San Angelo to comply with the straightforward procedure for establishing a community center: contracting in writing with authorization from the governing bodies.

(i) No evidence of written contract. There was no written contract between the participating agencies purporting to establish CONCHO VALLEY. (Appendix, 27.) No party has presented evidence[69] of a signed, partially signed, unsigned, or lost contract.

(ii) No evidence of governing body resolutions. Even more definitively, adverse parties present no evidence of (1) a resolution by any governing body agreeing to contract with others to establish CONCHO VALLEY or (2) a resolution authorizing the mayor or county judge to sign such a contract. Such resolutions were necessary since §3.01 required the contract be made through the governing bodies.

F. **Evidence proves lack of colorable compliance**. Though local agencies appointed board members and funded an MHMR operation that called itself a community center, they never achieved colorable, good faith compliance with the enabling act to create a statutory center:

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[69] CR 2802 (CV's Prod. #1, 07-09-97); CR 3917-3918 (City's Prod. #1-#3); CR 3895 (City's Interr. #3); .CR 2942 (CV's Interr., second para., 07-09-97); CR 2172 (CV, first para., 05-20-97); CR 1318, (CV Req. Prod. #1, 07-29-96); CR 872 (CV's Req. Adm. Nos. 41, 42, 07-28-95).

(1) August 31, 1968 contract "to develop a sound plan for organizing and operating a community center" that meets TDMHMR rules, between TOM GREEN COUNTY and TDMHMR,[70]

(2) governing body minutes in 1968 and 1969 from the CITY OF SAN ANGELO[71] and TOM GREEN COUNTY[72] discussing a proposed plan for establishing a community MHMR center,

(3) 1978 TDMHMR Audit Report,[73] saying in Finding No. 7, "[CONCHO VALLEY] Center did not have on record a contract entered into between the sponsoring agencies establishing the Center as required by Article 5547-203, Sec. 3.01(a) and Sec. 3.02 (b), V.A.C.S." CR 1702,

(4) CONCHO VALLEY's response to the 1978 Audit Report, arguing that a contract was not required in 1966, and "[i]t is questionable that a contract between the sponsoring agencies could be written at this time ....". CR 1702,

(5) CONCHO VALLEY's 1997 response to CRS' request for the written agreement required by §3.01: "Since at the time [CONCHO VALLEY] was established no such agreement was required by the cited statutes ... no such agreement could exist." (CR 2802, 2nd para.),

G. **Attempt to establish community MHMR center is void without good faith, colorable compliance with law**. Under Texas law, an organization is void (as opposed to voidable), cannot acquire de facto status, and may be attacked by private parties if there was not (i) **a good faith attempt to comply** and (ii) **colorable compliance** with the law. Private parties may collaterally attack the attempted organization if there was not "a good faith attempt to organize in the method prescribed by existing law, and at least a colorable compliance with that law." Hunt v. Atkinson, 12 S.W.2d 142, 145

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[70] CR 3386-3387, signed contract; CR 1970 commissioner court minutes.

[71] CR 2572, CR 2573, 7th par.; CR 2574, 3rd para.

[72] CR 1981; CR 1983, 3rd para.; CR 1985, 6th para.

[73] "Management Audit Report by the Community Services Division, TDMHMR, Austin, Texas, on the MHMR Center For Greater West Texas," dated June 23, 1978 (CR 1690), authenticated by affidavit by Daryl Dorcy (CR 1686).

(Tex. Comm'n App. 1929, judgm't adopted); set aside on other grounds, 17 S.W.2d 780 (Tex. Comm'n App.)

H. **1989 change in trustee selection procedure did not establish center**. In November-December 1989 CITY OF SAN ANGELO, TOM GREEN COUNTY, San Angelo Independent School District, and Angelo State University (ASU) adopted a new procedure for selecting CONCHO VALLEY board members.[74] They recited that they had agreed in 1966 to establish the CONCHO VALLEY organization. Far from displaying an intent to contract in 1989 to establish a new community center, it reflects a false assumption that CONCHO VALLEY was created 23 years earlier.

Further, ASU could not have helped establish a community center in 1989. A state university's right to do so ended in 1969 (see fn 39) and its participation in a trustee selection procedure approved and applied to a center created in 1989 would be void per se. Id.

I. **1989 change in trustee selection procedure raises fact issue, at minimum.** Even if a contract establishing CONCHO VALLEY was adopted at the end of 1989, fact issues arise as to when enough new trustees were appointed afterward to create a quorum, and how soon after that the center could apply for and secure lawful TDMHMR designation as an MRA/designated provider. Only then could it legally be the local referral center. Much of defendants' injurious conduct occurred before November 28, 1989 or within 18 months thereafter.[75]

PRAYER

Wherefore, Petitioner respectfully asks the U.S. Supreme Court to grant its petition for writ of certiorari.

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[74] CR 3846, 3848; CR 3859 (county); CR 3861 (city); CR 3862 (ASU); CR 3865, 3871 (SAISD).

[75] CR 475-477 (Cochran aff., para. 9-15); CR 488-491 (Riggs aff., para. 4, 6-16); CR 3031-3035 (Cochran aff., para. 18-27).

Supreme Court, U.S.
(2) FILED
NO. 00 219 JUL 26 2000
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

CONCHO RESIDENTIAL SERVICE, INC., Petitioner

VS.

MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER,

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On Petition For Writ Of Certiorari to the Court Of Appeals, Third Supreme Judicial District, at Austin, State of Texas, No. 03-98-00022-CV

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Corporate Disclosure Statement: Concho Residential Service, Inc., a Texas corporation ("CRS"), is not owned by a parent corporation and no publicly held company owns 10% or more of CRS' stock. CRS owns stock in Oxford Square, Inc., a Texas corporation, that is not publicly held.

Excerpts, Community MHMR Center Enabling Act
Tex. Rev. Civ. Stat. Ann. art. 5547-203
(1988 Vernon Supp.)

Art. 5547-203 Community centers for mental health and mental retardation services

Agencies authorized to establish and operate community center; contracts

Sec. 3.01 (a) Local agencies which may establish and operate community centers are a county, a city, a hospital district, a school district, or any organizational combination of two (2) or more of these. When community centers are established by an organizational combination, the governing bodies of such organizational combination shall enter into a contract between or among them which shall stipulate whether the board of trustees shall consist of not less than five (5) nor more than nine (9) members selected from the governing bodies of the organizational combination, or of not less than five (5) nor more than nine (9) members to be appointed from the qualified voters of the region to be served. This contract may be renegotiated or amended from time to time as necessary to change the method of establishing a board of trustees.

(b) As used in this Act, a "community center" may be:

(1) a community health center, which provides mental health services;

(2) a community mental retardation center, which provides mental retardation services; or

(3) a community mental health and mental retardation center, which provides mental health and mental retardation services.

(c) A community center is an agency of the state, a governmental unit, and a unit of local government as defined and specified by Chapters 101 and 102, Civil Practice and Remedies Code, and a local government as defined by Section 3, The Interlocal Cooperation Act (Article 4413(32c), Vernon's Texas Civil Statutes).

(d) A community center may not be established unless the region to be served by the center contains a population of at least two hundred thousand (200,000), according to the most recent federal census.

....

Sec. 3.05 (a) The board of trustees is responsible for the administration of community centers.

(b) The board of trustees shall develop policies consistent with the rules, regulations, and standards of the Department.

(c) The board of trustees shall standardize qualifications for personnel positions for the community center consistent with those developed by the Commissioner in Subsection (f) of Section 2.12 of this Act.

....

Sec. 3.09 Each participating local agency may contribute lands, buildings, facilities, personnel and funds for the administration of the various programs and services of a community center.

....

Excerpts,
Texas Free Enterprise & Antitrust Act of 1983
Tex. Bus. & Com. Code §15.01 et seq. (West 1994)

§15.01. Title of Act

This Act shall be known and may be cited as the Texas Free Enterprise and Antitrust Act of 1983.

§15.02. Applicability of Provisions

(a) The provisions of this Act are cumulative of each other and of any other provision of law of this state in effect relating to the same subject. Among other things, the provisions of t his Act preserve the constitutional and common law authority of the attorney general to bring actions under state and federal law.

(b) If any of the provisions of this Act are held invalid, the remainder shall not be affected as a result; nor shall the application of the provision held invalid to persons or circumstances other than those as to which it is held invalid be affected as a result.

§15.03. Definitions

Except as otherwise provided in Subsection (a) of Section 15.10 of this Act, for purposes of this Act:

(1) The term "attorney general" means the Attorney General of Texas or any assistant attorney general acting under the direction of the Attorney General of Texas.

(2) The term "goods" means any property, tangible or intangible, real, personal, or mixed, and any article, commodity, or other thing of value, including insurance.

(3) The term "person" means a natural person, proprietorship, partnership, corporation, municipal corporation, association, or any other public or private group, however, organized, but does not include the State of Texas, its departments, and its administrative agencies.

(4) The term "services" means any work or labor, including without limitation work or labor furnished in connection with the sale, lease, or repair of goods.

(5) The terms "trade" and "commerce" mean the sale, purchase, lease, exchange, or disribution of any goods or services; the offering for sale, purchase, lease, or exchange of any goods or services; the business of insurance; and all other economic activity undertaken in whole or in part for the purpose of financial gain involving or relating to any goods or services.

§15.04. Purpose and Construction.

The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state. The provisions of this Act shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose.

§15.05. Unlawful practices

(a) Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful.

(b) It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce.

[(c) through (f) are not reproduced in this Appendix]

(g) Nothing in this section shall be construed to prohibit activities that are exempt from the operation of the federal antitrust laws, 15 U.S.C. Section 1 et seq., except that an exemption otherwise available under the McCarran-Ferguson Act (15 U.S.C. Sections 1011-1015) does not serve to exempt activities under this Act. Nothing in this section shall apply to actions required or affirmatively approved by any statute of this state or of the United States or by a regulatory agency of this state or of the United States duly acting under any constitutional or statutory authority vesting the

agency with such power.

[(h), (i) are not reproduced in this Appendix]

§15.20 Suits by Injured Persons or Governmental Entities

(a) Suit to Recover Damages.

(1) Any person or governmental entity, including the State of Texas and any of its political subdivisions or tax-supported institutions, whose business or property has been injured by reason of any conduct declared unlawful in Subsection (a), (b), or (c) of Section 15.05 of this Act may sue any person, other than a municipal corporation, in district court in any county of this state in which any of the named defendants resides, does business, or maintains its principal office or in any county in which any of the named plaintiffs resided at the time the cause of action or any part thereof arose and shall recover actual damages sustained, interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment (the rate of such interest to be in accordance with Texas law regarding postjudgment interest rates and the amount of interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances), and the cost of suit, including a reasonable attorney's fee; provided, however, that if the trier of fact finds that the unlawful conduct was willful or flagrant, it shall increase the recovery to threefold the damages sustained and the cost of suit, including a reasonable attorney's fee; provided that interest on actual damages as specified above may not be recovered when recovered damages are increased threefold.

[(b) through (c) are not reproduced in this Appendix]

NO. CV92-0444-B

CONCHO RESIDENTIAL SERVICE, INC., Plaintiff,	§	IN THE DISTRICT COURT
	§	OF
v.	§	TOM GREEN COUNTY, TEXAS
MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As A Purported Community And Its Capacity As A Mental Retardation Authority; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE,TOM GREEN COUNTY, CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, and HALE COUNTY	§	119TH JUDICIAL DISTRICT

ORDER GRANTING HALE COUNTY'S
MOTION FOR SUMMARY JUDGMENT

BE IT REMEMBERED, that on the 2nd day of August, 1995, came on to be considered Defendant Hale County's previously filed Motion for Summary Judgment. The Court, having considered the pleadings and evidence in support of summary judgment, together with argument of counsel, is of the opinion that Hale County should be granted summary judgment.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Summary Judgement be rendered in favor of Hale County, Texas, and and that plaintiff Concho Residential Service, Inc. be denied all relief against Hale County, Texas. All relief requested and not expressly granted is denied. SIGNED this 11th day of Sept. 1995.

/s/

HONORABLE ROYAL HART

NO. CV92-0444-B

CONCHO RESIDENTIAL SERVICE, INC., Plaintiff,	§	IN THE DISTRICT COURT
	§	OF
v.	§	TOM GREEN COUNTY, TEXAS
MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, ET AL	§	119TH JUDICIAL DISTRICT

FINAL SUMMARY JUDGMENT FOR TOM GREEN COUNTY

On May 28, 1996, came on to be heard the Motion for Summary Judgment of Defendant, TOM GREEN COUNTY, TEXAS ("TOM GREEN COUNTY") in the above styled and numbered cause. The parties appeared by and through their respective attorneys of record and announced ready for hearing whereupon the Court noted that the Motion was made in proper form and time, proper service has been made upon the Plaintiff, and the Plaintiff has been properly notified of the hearing of same, all in accordance with Rule 166a of the Texas Rules of Civil Procedure. The Court, after examining the pleadings and summary judgment evidence and hearing the argument of counsel, determines that TOM GREEN COUNTY is entitled to summary judgment upon the Plaintiff's entire case against TOM GREEN COUNTY.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that summary judgement be rendered in favor of TOM GREEN COUNTY upon the Plaintiff's case in its entirety against TOM GREEN COUNTY; and, accordingly, that Plaintiff, CONCHO RESIDENTIAL SERVICES, INC., take nothing against Defendant, TOM GREEN COUNTY, and that said Defendant recover all costs incurred on its behalf from Plaintiff. All relief not expressly granted is denied.

SIGNED on May 28, 1996.

/s/

HONORABLE ROYAL HART

NO. CV92-0444-B

CONCHO RESIDENTIAL SERVICE, INC., Plaintiff,	§	IN THE DISTRICT COURT
	§	OF
v.	§	TOM GREEN COUNTY, TEXAS
MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As A Purported Community And Its Capacity As A Mental Retardation Authority; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE,TOM GREEN COUNTY, CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, and HALE COUNTY	§	119TH JUDICIAL DISTRICT

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

On the 2nd day of August, 1995, came on to be heard the First Amended Motion for Summary Judgment filed by Defendants MHMR Services for the Concho Valley a/k/a Concho Valley Center for Human Advancement, in its capacity as Community MHMR Center and its capacity as Mental Retardation Authority, James Young, Joe Fin, Karen Sheppard, the Texas Council of Community MHMR Centers, Inc., Spencer McClure,

and Central Plains Center for MHMR and Substance Abuse. After reviewing the pleadings, motions, and evidence on file, and after hearing the argument of counsel, the Court finds that Defendants' First Amended Motion for Summary Judgment is meritorious and should be granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants' First Amended Motion for Summary Judgement is hereby GRANTED as to all of Plaintiffs' claims arising under the Texas Free Enterprise and Antitrust Act of 1983, which includes all claims in Plaintiff's Second Amended Original Petition except for the tortious interference claim set forth in Sections XXVI-XXXI (paragraphs 26.01 through 31.03) and the injunction claims on p.63(8), and also includes all claims in Plaintiff's Third Amended Original Petition except for the tortious interference claim set forth in Sections XXVI-XXXI (paragraphs 26.01 through 31.03) and the injunction claim set forth in Section 32.02 and 32.03, and p. 62(8), and that Plaintiff shall take nothing as against Defendants for any such causes of action arising under the Texas Free Enterprise and Antitrust Act of 1983.

SIGNED this 29th day of Oct. 1996.

/s/

HONORABLE ROYAL HART
JUDGE PRESIDING

NO. CV92-0444-B

CONCHO RESIDENTIAL SERVICE, INC., Plaintiff,	§	IN THE DISTRICT COURT
v.	§	OF TOM GREEN COUNTY, TEXAS
MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority, And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER	§	119TH JUDICIAL DISTRICT

Defendants.

FINAL SUMMARY JUDGMENT

CAME ON for consideration:

I.

1. On July 25, 1997, the Court heard and considered the following, with all parties appearing by and through their respective counsel:

a. Defendants' Restated and Amended Motion for Summary Judgment and Conditional Motion to Sever by MHMR Services for the Concho Valley a/k/a Concho Valley Center For Human Advancement, In Its Capacity As Community MHMR Center and Its Capacity as Mental Retardation Authority; James Young, Joe Finn, Karen Sheppard, John Brubaker, The Texas Council of Community MHMR Centers, Inc., Spencer McClure, Texas Council Risk Management Fund, Board of Trustees of The Texas Council Risk Management Fund, as Trustee of the Liability Trust Account, Brian Crews, JI Specialty Services, Inc., Central Plains Center for MHMR and Substance Abuse; and Richard Hall, Hector Cantu, James Coffey, Ruby Guttierez, Sheirran Hughes, Brenda Morris, Jacqueline Shannon, and Roger Sidener;

b. Defendants' Addendum to Restated and Amended Motion for Summary Judgement and Conditional Motion to Sever by MHMR Services for the Concho Valley a/k/a Concho Valley Center For Human Advancement, In Its Capacity As Community MHMR Cente and Its Capacity as Mental Retardation Authority; James Young, Joe Finn, Karen Sheppard, John Brubaker, The Texas Council of Community MHMR Centers, Inc., Spencer McClure, Texas Council Risk Management Fund, Board of Trustees of The Texas Council Risk Management Fund, as Trustee for the Liability Trust Account, the Property Trust Account, and the Workers' Compensation Trust Account, Brian Crews, JI Specialty Services, Inc., Central Plains Center for MHMR and Substance Abuse; and Richard Hall, Hector Cantu, James Coffey, Ruby Guttierez, Sheirran Hughes, Brenda Morris, Jacqueline Shannon, and Roger Sidener;

c. Defendants' Motion for Leave to File Defendants' Reply Regarding Pending Summary Judgment Motions by MHMR Services for the Concho Valley a/k/a Concho Valley Center For Human Advancement, In Its Capacity As Community MHMR Center and Its Capacity as Mental Retardation Authority; James Young, Joe Finn, Karen Sheppard, John Brubaker, The Texas Council of Community MHMR Centers, Inc., Spencer McClure, Texas Council Risk Management Fund, Board of Trustees of The Texas Council Risk Management Fund, as Trustee of the Liability Trust Account, the Property Trust Account, and the Workers' Compensation

Trust Account, Brian Crews JI Specialty Services, Inc., Central Plains Center for MHMR and Substance Abuse; and Richard Hall, Hector Cantu, James Coffey, Ruby Guttierez, Sheirran Hughes, Brenda Morris, Jacqueline Shannon, and Roger Sidener;

d. Defendants' Reply Regarding Pending Summary Judgement Motions by MHMR Services for the Concho Valley a/k/a Concho Valley Center For Human Advancement, In Its As Community MHMR Center and Its Capacity as Mental Retardation Authority; James Young, Joe Finn, Karen Sheppard, John Brubaker, The Texas Council of Community MHMR Centers, Inc., Spencer McClure, Texas Council Risk Management Fund, Board of Trustees of The Texas Council Risk Management Fund, as Trustee of the Liability Trust Account, the Property Trust Account, and the Workers' Compensation Trust Account, Brian Crews JI Specialty Services, Inc., Central Plains Center for MHMR and Substance Abuse; and Richard Hall, Hector Cantu, James Coffey, Ruby Guttierez, Sheirran Hughes, Brenda Morris, Jacqueline Shannon, and Roger Sidener; and

e. Tom Green County's Supplemental Motion for Summary Judgement with Supporting Authorities;

f. Tom Green County's Second Supplemental Motion for Summary Judgement (including the First Supplemental Affidavit of Judith Hawkins, filed contemporaneously therewith on July 3, 1997).

g. Tom Green County's Reply re: Pending Motion for Summary Judgement;

h. Tom Green County's Motion for Leave to File Additional Summary Judgement Proof;

i. Defendant's, City of San Angelo, Motion for Summary Judgement;

j. Defendant's, The City of San Angelo, First Supplemental Motion for Summary Judgement; and

k. Defendant's The City of San Angelo, Second Supplemental Motion and Reply to Plaintiff's First Response to Defendant's, City of San Angelo, Motion for Summary Judgement.

2. Also on July 25, 1997, and immediately before taking up consideration of the other summary judgement matters described in paragraph 1, above, the Court considered the following motions, with all parties represented by counsel:

a. The Defendants' Motion for Leave to File Defendants' Reply Regarding Pending Summary Judgement Motions (identified in

Paragraph 1(c), above) and Tom Green County's Motion for Leave to File Additional Summary Judgement Proof (identified in Paragraph 1(h), above); and, finding that those Motions were well taken, the Court granted them by separate Orders entered in this cause.

b. The Plaintiff's Omnibus Motion Regarding Second Round of Defendants' Summary Judgement Motions; and finding the Motion lacking in merit, except in part, denied the motion (except in part) by its separate Order Denying Plaintiff's Omnibus Motion Regarding Second Round of Defendants' Summary Judgment Motions signed December 19, 1997; but as confirmed by that separate order, the seven page "Contract for Mental Retardation Services" attached thereto was made part of the Summary judgment record on Plaintiff's designation and was considered by the court at the July 25, 1997, hearing on the summary judgment motions described in paragraph 1, above.

3. Subsequent to July 25, 1997, the following items were filed, made part of the summary judgment record on Plaintiff's designation, and considered by the Court in connection with the motions described in paragraph 1, above:

a. Defendant's, The City of San Angelo, Second Amended Responses to Plaintiff's First Amended Written Interogatories; and

b. Defendant's, The City of San Angelo, Second Amended Responses to Plaintiff's Second Request for Production.

4. The Court notes that it has previously, prior to July 1997, rendered interlocutory summary judgments, as follows:

a. A Final Summary Judgment for Tom Green County dated May 28, 1996, disposing of all claims pending against Tom Green County as of that date;

b. An Order Granting Partial Summary Judgment for Defendants MHMR Services for the Concho Valley a/k/a Concho Valley Center For Human Advancement, In Its As Capacity as Community MHMR Center and Its Capacity as Mental Retardation Authority; James Young, Joe Finn, Karen Sheppard, The Texas Council of Community MHMR Centers, Inc., Spencer McClure and Central Plains Center for MHMR and Substance Abuse dated October 29, 1996, disposing of all claims arising under the Texas Free Enterprise and Antitrust Act of 1983; and

c. An Order Granting Hale County's Motion for Summary Judgment for Defendant Hale County dated September 15, 1995, disposing of all claims pending against that defendant.

5. Since July 25, 1997, the following have also been filed and are before the Court for consideration:

a. Motion for Nonsuit of Counterclaims by Defendants/Counterplaintiffs HMR Services for the Concho Valley, James Young, Joe Finn, Karen Sheppard, The Texas Council of Community MHMR Centers, Inc., Spencer McClure and Central Plains Center for MHMR and Substance Abuse;

b. Motion for Nonsuit of Counterclaim by Defendant/Counterplaintiff John Brubaker;

c. Motion for Nonsuit of Counterclaims by Defendants/Counterplaintiffs Texas Council Risk Management Fund, Board of Trustees of Texas Council Risk Management Fund as Trustee of the Liability Trust Fund Account, Brian Crews, and JI Specialty Services, Inc.;

d. Notice of Nonsuit by Tom Green County Re: Its DTPA Counterclaim; and

e. Motion for Non-Suit of Counterclaims by Defendent/Counterplaintiff, City of San Angelo.

II.

The Court has considered all the motions for nonsuit (identified in paragraph 5 if Part I, above) and determined that they should be granted. Accordingly, IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the above referenced requests for Nonsuit are GRANTED and that all Counterclaims of Defendants/Counterplaintiffs are hereby nonsuited without prejudice to the rights of Defendants/Counterplaintiffs to refile same.

The Court has also considered all motions for summary judgment identified above (including all replies and responses thereon), the pleadings, the summary judgment evidence (including the matters referenced in paragraphs 2a, 2b, 3a and 3b of Part 1, above) the briefs and arguments of counsel, and finds that there is no genuine issue of material fact and that the remaining Defendants (namely, all Defendants except Hale County, to whom summary judgment has previously been granted) are entitled to judgment as a matter of law on all claims raised by Plaintiff in this suit. Accordingly,

IT IS FURTHER ORDERED, ADJUDGED and DECREED that a Final Summary Judgment be, and is hereby, GRANTED as to all causes of action asserted by Plaintiff against the above referenced Defendants; that Plaintiff takes nothing by this suit; and that this Final Summary Judgment

disposes of all remaining claims (that is, claims not disposed of by the earlier interlocutory summary judgments described in paragraph 4, above) against all Defendants herein.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all costs of court expended or incurred in this cause are taxed against Plaintiff, for which let execution issue.

All relief requested and not expressly granted herein is denied.

SIGNED this the day of December 19 , 1997.

/s/

JUDGE PRESIDING

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED AUGUST 26, 1999

NO. 03-98-00022-CV

CONCHO RESIDENTIAL SERVICE, INC., Appellant

V.

MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority, And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER,Appellees.

APPEAL FROM 119TH DISTRICT COURT OF TOM GREEN COUNTY BEFORE JUSTICES JONES, KIDD AND PATTERSON AFFIRMED IN PART; VACATED AND DISMISSED IN PART-- OPINION BY JUSTICE JONES

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court

that there was no error in the trial court's summary judgment EXCEPT as to the rendition of judgment with respect to appellant's seeking to enjoin Concho Valley from future membership in the Texas Council: IT IS THEREFORE considered, adjudged and ordered that the portion of the summary judgment with respect to Concho Residential Services, Inc. taking nothing by its request for injunctive relief is vacated, and judgment is rendered dismissing that claim. The remainder of the summary judgment is affirmed.

It is FURTHER ordered that the appellant, Concho Residential Services, Inc., pay all costs relating to this appeal, both in this Court and the court below; and that this decision with a copy of the opinion herein delivered be certified below for observance.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-98-00022-CV

CONCHO RESIDENTIAL SERVICE, INC., Appellant

V.

MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority, And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER, Appellees.

FROM THE DISTRICT COURT OF TOM GREEN COUNTY, 119TH JUDICIAL DISTRICT NO. CV92-0444-B, HONORABLE ROYAL HART, JUDGE PRESIDING

Appellant Concho Residential Services, Inc. ("CRS") sued appellees MHMR Services for the Concho Valley (Concho Valley) and 22

others[1] for damages and injunctive relief, alleging multiple statutory and common-law causes of action. The trial court rendered summary judgment that CRS take nothing, disposing of all causes of action against all appellees. CRS perfected this appeal. We will affirm in part and dismiss the cause in part.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves the expansive legislative scheme for providing mental health and mental retardation services to the citizens of Texas. The Texas Department of Mental Health and Mental Retardation ("TDMHMR") and other governmental entities operating under its direction shoulder the responsibility of providing the administration and delivery of mental health and mental retardation services to the public. *See* Tex. Health & Safety Code Ann. §§ 531.001-615.002 (West 1992 & Supp. 1999) A key element in the statutory scheme is the establishment of mental health and mental retardation community centers, which provide the needed services to mentally disabled persons at a local level under the supervision of TDMHMR. These community centers are created by local governmental entities such as counties, municipalities, or hospital districts, or a combination of entities joining together. *See id* § 534.001. Community centers are, by statutory definition, "an agency of the state, a governmental unit, and a unit of local government." *Id.*

Also key in the statutory scheme is the creation of Mental Health or Mental Retardation Authorities ("MRAs"). MRAs are selected by TDMHMR and contract directly with the agency. It is the duty of the MRA to ensure that the statutorily mandated services are provided in its designated service area and to oversee state-funded community-based services. *See id.* §§ 534.052-.070. MRAs, in turn, work with community centers, as well as private entity providers of mental retardation and mental health services. Each MRA acts as the referral center for MHMR services in its service area.

At all times relevant to this suit, CRS was a for-profit provider of residential facilities and services to mentally retarded persons. Concho

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[1]There are 23 named appellees in the appeal, generally referred to collectively as appelleess. As necessary, we will refer to appellees individually by name.

Valley was both a community center and a designated MRA.

Although CRS asserted numerous claims against the various appellees, the crux of CRS's complaint is that Concho Valley and several of its employees allegedly blocked potential client's access to CRS's residential facilities. CRS alleges that Concho Valley conspired with the City of San Angelo and Tom Green County-the local governmental creators of Concho Valley - to limit CRS's business; alternatively, CRS argues that the City of San Angelo and Tom Green County are vicariously liable for Concho's conduct. CRS also sought an injunction prohibiting ConchoValley from being a member of the Texas Council, a nonprofit corporation made up of community centers from all around Texas. The remaining appellees are asserted to be either directly liable for their participation in the conspiracy and other fraudulent acts, or derivatively liable due to their association with Concho Valley or the Texas Council.

DISCUSSION

CRS presents sixteen issues for this Court's review. The first complaints generally that the tiral court erred in granting summary judgment disposing of all of its causes of action against all appellees.[2] Issue two concerns the trial court's denial of CRS's request for injunctive relief. Issues three through six assert error related to the trial court's refusal to grant a default judgment against Tom Green County. Issue seven asserts generally that the trial court erred in dismissing the claims against Hale County. Issue nine addresses CRS's claims brought under the Deceptive

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[2] The trial court rendered the following orders: (1) summary judgment for Tom Green County dated May 28, 1996, disposing of all claims against the county; (2) summary judgment for Concho Valley, Young, Finn, Sheppard, Texas Council, McClure, and Central Plains dated October 29, 1996, disposing of all claims arising under the Texas Free Enterprise Antitrust Act; (3) summary judgment for Hale County dated September 15, 1995, disposing of all claims against the County; and (4) final summary judgment dated December 19, 1997, disposing of all claims against all defendants.

Trade Practices-Consumer Protection Act ("DTPA").[3] The tenth and eleventh issues concern federal claims for violation of the Racketeer Influenced Corrupt Organizations Act ("RICO")[4] and "section 1983."[5] Issue twelve complains of the trial court's disposal of various common-law claims. Issue thirteen asserts error related to the dismissal of CRS's statutory claims grounded in the Persons with Mental Retardation Act of 1977.[6] Issue fourteen generally contends that the court erred in disposing of the vicarious liability claims against Central Plains. The final two issues complain of procedural rulings by the trial court.

Antitrust Liability

CRS asserted claims under Texas Free Enterprise and Antitrust Act of 1983 ("Antitrust Act" or "Texas Act")[7] against Concho Valley; Concho Valley Employees Finn, Sheppard, Young; Tom Green County; the Texas Council; McClure (Council director); and Central Plains, a community center and member of the Council. CRS argues that the named appellees violated the Antitrust Act by conspiring to restrict the access of potential clients from CRS's services. The appellees respond that their conduct is "immunized from antitrust liability by exemptions derived directly from the Texas Antitrust Act and from federal laws incorporated by the Act." We agree.

The purpose of the Antitrust Act is to promote economic competition in commerce in Texas. *See* Tex. Bus. & Com. Code Ann. § 15.04 (West 1987). As such, the restraint of trade or commerce is made

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[3] *See* Tex. Bus. & Com. Code Ann. § 17.46 (West 1987 & Supp. 1999).

[4] *See*18 U.S. C.A. § 1961 (West 1984 & Supp. 1999).

[5] *See* 42 U.S.C.A § 1983 (West 1994 & Supp. 1999).

[6] *See*18 Tex. Health & Safety Code Ann. §§ 591.001-.025 (West 1992 & Supp. 1999)

[7] Tex. Bus. & Com. Code Ann. §§ 15.01-.52 (West 1987 & Supp. 1999).

unlawful. See *id.* § 15.05(a). The 1983 Act was meant to be a major reform and modernization of Texas antitrust law and is modeled after the federal Sherman Antitrust Act and Clayton Act. *See Caller-Times Publishing Co. V. Triad Communications, Inc.*, 826 S.W.2d 576, 579-80 (Tex. 1992). The Texas Act explicitly states that its provisions "shall be construed...in harmony with federal judicial interpretations of comparable federal antitrust statutes...." Bus. & Com. Code § 15.04. It is to one of these federal judicial interpretations that we now turn.

Since 1943, the United States Supreme Court, in interpreting federal antitrust statutes, has recognized that antitrust laws do not apply to anti-competitive restraints imposed "as an act of government." *Parker v. Brown*, 317 U.S. 341, 352 (1943). *Parker* involved a marketing program adopted pursuant to the California Agricultural Prorate Act governing the 1940 California raisin crop. Brown, a producer of raisins, complained that the program violated the Sherman Act. The Court rejected this contention, relying on principles of federalism and state sovereignty, holding that the Sherman Act should be interpreted as a prohibition on individual, not "state action." *Id.* At 352. Because the program was not the product of a private agreement or combination by others in restraint of trade, it did not violate the Sherman Act. *Id.* at 351. The Court stated: "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Acet did not undertake to prohibit." *Id.* at 352. Because the Texas Act specifically adopts federal judicial interpretation of federal antitrust law, we are bound to apply the *Parker* state action exemption to the Texas Act. *See* Bus. & Com. Code § 15.04.

Texas has chosen to regulate the health and welfare of its mentally challenged citizens through a comprehensive statutory scheme, rather that leaving the availability of services to the marketplace. We believe this regulation fits squarely within the *Parker* exemption for an "act of government by the State as sovereign." *See City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 365, 370 (1991) (confirming Sherman Act does not apply to anti-competitive restraints imposed by states as an act of government). As in *Parker*, Texas has not entered into a conspiracy to restrain for-profit entities from providing services to mentally challenged persons. Rather, the state has decided to pursue a policy of replacing competition with regulation.

The statutory scheme charges TDMHMR with governing

the state policies concerning mentally disabled persons. In turn, local community centers are created to carry out the state's policies, with extensive oversight b TDMHMR. By definition, community centers are agencies of the state. *See* Health & Safety Code § 534.001. As state agencies engaging in acts of government by the state, these centers enjoy antitrust immunity under the state-action exemption. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 360-62 (1977); *Benton, Benton & Benton v. Louisiana Pub. Facilities Auth.*, 897 F.2d 198,,199,203 (5th Cir. 1990).[8] We conclude that the *Parker* state-action exception is applicable to statutorily created state agency community centers such as Concho Valley and Central Plains.

Furthermore, the individuals Finn, Sheppard, and Young, as employees of Concho Valley, also enjoy the benefits of the *Parker* state-action exemption. The state-action doctrine applies equally to the officers and agents of the governmental body who participate in the challenged conduct. *See Foley v. Alabama State Bar*, 648 F.2d 355,359 (5th Cir. 1981) (citing *City of Lafayette*, 435 U.S. 389). We hold the trial court did not err in disposing of CRS's antitrust claims against these individuals.

Similarly, the Texas Council and its director McClure enjoy the benefits of the *Parker* state-action doctrine. State-action immunity extends to private persons and entities taking a role in implementing state policy of always using the same law firm as bond counsel. Attorneys from a law firm not selected sued both the agency and the chosen private attorneys, alleging antitrust violations. The court found that not only was the agency protected by the state-action exemption, the private attorneys selected to perform services for the public agency were also shielded by the doctrine. *See id.*

In the instant case, the summary judgment evidence shows that the Texas Council is created and governed by its community center membership for the sole purpose of performing services for the center in their endeavors to provide services to mentally challenged Texans. Accordingly, the Texas Council and its agent McClure and entitled to the state-action exemption.

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[8] This is to be contrasted with municipalities, which are not themselves sovereign, and therefore carry a higher burden to demonstrate that their anti-competitive actions are authorized by the state pursuant to the state's policy to replace competition with regulation. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40-42 (1985).

We hold that the trial court did not err in disposing of CRS's antitrust claims against Texas Council and McClure.

Finally, CRS asserted antitrust claims against Tom Green County. Because the County is also exempt form antitrust liability, this claim fails. The federal Local Government Antitrust Act of 1984 expressly immunizes all local governmental entities from antitrust liability under the Clayton Act. *See* 15 U.S.C.A. § § 34-36 (West 1997). Counties are included in the definition of "local government". *Id.* § 34. As noted previously, the purpose of the Texas Act was to drastically reform Texas antitrust law to mirror federal antitrust law. *See Caller-Times*, 826 S.W.2nd at 579-80. The legislature explicitly adopted federal judicial interpretations of comparable federal antitrust statutes, and further provided that nothing in the Antitrust Act should be "construed to prohibit activities that are exempt from the operation of the federal antitrust laws." *See* Bus. & Com. Code § § 15.04, 15.05(g). We believe these expressions of the legislature incorporate the local government exemption for counties contained in the Local Government Antitrust Act. Further, as previously noted, the Texas Act also includes its own state-action exemption, which we conclude is expansive enough to cover the County's participation in the anti-competitive scheme. *See id.*§ 15.05 (g). Accordingly, we hold that the trial court did not err in dismissing CRS's antitrust claims against Tom Green County.

Lawfully Formed community Centers

As will be made clear later in this opinion, CRS's causes of action for DTPA violations, RICO violations, and common-law torts are premised on its assertion that Concho Valley and Central Plains are not legally constituted community centers and thus are not governmental entities entitled to sovereign immunity. Accordingly, we turn to the threshold issue of the community centers' legitimacy.

1. Failure for Lack of Contract

Concho Valley and Central Plains were established in June 1966 and July 1967, respectively, pursuant to article 3 of the Mental Health and Mental Retardation Act ("MHMRA") as enacted in 1965. See Act of April 5, 1965, 59th Leg., R.S., ch. 67, § 1, 1965 Tex. Gen. Laws 165, 171 (since repealed and codified as amended at Health & Safety Code Title VII). Section 3.01 of the MHMRA, as it existed at the community centers' creation, provided:

> One or more cities, counties, hospital districts, school districts, rehabilitation districts, state-supported institutions of higher education, and state-supported medical schools, or any combination of these, may cooperate, negotiate, and contract with each other through their governing bodies to establish and operate a community center.

Id.

It is undisputed that the creating entities of Concho Valley and Central Plains did not enter into written contracts to establish the two community centers. CRS urges this Court to read the above-quoted language to *require* a written contract as a prerequisite to the valid establishment of the community center. We decline to do so.

We read section 3.01, as written in 1965, to allow the joint creation and operation of a community center by cooperation, negotiation, or contract between local governmental entities. Clearly, the legislature meant to *authorize* the creation of community centers by means of contract. It appears that the legislature may have anticipated these local entities were likely to enter into contracts when forming joint community centers. However, there is nothing to indicate that the entities were *required* to form a written contract, or that the failure to do so would *invalidate* the legal existence of a jointly formed community center.[9]

Even assuming, however, that the version of section 3.01 applicable in 1967 could somehow be construed to require a contract in the formation of a community center, the record shows that in 1967 the creating entities of Central Plains did enter into a written agreement governing the selection of trustees for the center. In November 1989, the sponsoring local government creators of Concho Valley adopted written procedures setting forth, among other things, the selection of trustees, as required by the

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[9] We note that section 3.01 was amended in 1969 to *require* the governing bodies creating a community center to enter into a contract. *See* Act of June 12, 1969, 61st Leg., R.S.,ch 688, § 3, 1969 Tex. Gen. Laws 2010, 2012 (since repealed and codified as amended at Health & Safety Code Title VII)/ We believe this supports our conclusion that prior to the amendment, when Concho Valley and Central Plains were created, no contract was required.

version of section 3.01 applicable in 1989. See Act of June 20, 1987, 70th Leg., R.S., ch 956, § 3.01, 1987 Tex. Gen. Laws 3194, 3211 (since repealed and codified as amended at Health & Safety Code Title VII). Therefore, at the time the present lawsuit was filed, and only months following the date CRS alleges Concho Valley's offending conduct began, both centers had written contracts in place.

We decline to invalidate Concho Valley and Central Plains' 30--year history as legally created community centers for lack of written contracts at their inception.

2. Failure as Incorporated Entity

CRS next argues that because Central Plains was incorporated from 1969 ti 1996 as nonprofit corporation, it cannot be a valid community center. Basically, CRS contends that because governmental entities may not legally fund a corporation, and because the sponsoring governmental entities provide Central Plains with funding, Central Plains must not be a community center.

We are unpersuaded by this argument. Central Plains was incorporated pursuant to the Texas Non-Profit Corporation Act.[10] The summary-judgment evidence shows that Central Plains exercises only public functions for public purposes under the control of the State. Contrary to CRS's assertions, Central plains is governed by a board of trustees appointed by the participating local governmental entities creating the community center. Nothing in the statute authorizing the creation of community center indicates that a center may not be a nonprofit corporation properly formed under the Texas Non-Profit Corporation Act. We fail to see how Central Plains' nonprofit corporate status strips it of its identity as a governmental entity.

We reject CRS's contention that Concho Valley Central Plains are not valid community centers. Having so held, we turn to those causes of action asserted by CRS turning on the premise that the centers are invalid, and thus not governmental entities entitled to sovereign immunity.

RICO Claims

CRS contends in its tenth issue that the trial court erred in disposing

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[10] Tex. Rev. Civ. Stat. Amm. art. 1396-1.01-11.01 (West 1997 & Supp. 1999).

of its cause of action asserting RICO violations. As conceded by CRS in its brief to this Court, however, its RICO claims fail if this Court finds Concho Valley and Central Plains are legitimate community centers entitled to sovereign immunity from these claims. Moreover, CRS's RICO claims against appellees other that Concho Valley and Central Plains are premised on their alleged improper holding out of the community centers as legitimate. Because we reject CRS's contention that the centers are illegitimate, the RICO claims against all appellees fail accordingly. We hold that the trial court did not err in rendering judgment that CRS take nothing by its RICO cause of action.

Common-law Tort Claims

CRS next challenges the trial court's rejection of its common-law tort claims against all appellees, including claims of fraud, negligence, and tortious interference with contract. CRS's challenge fails for two reasons.

First, CRS provides no authority or argument to this Court that sovereign immunity has been waived; accordingly, CRS has failed to present anything for us to review, and the judgment should be affirmed on this ground alone. *See Rodriguez v. Morgan*, 584 S. W. 2d 558, 559(Tex. Civ. App.-Austin 1979, writ ref'd, n.r.e.). To the extent CRS asserts that sovereign immunity has been waived due to Concho Valley's and Central Plains' not being valid community centers, and therefore not governmental units, we have rejected this argument, as discussed above.

Second, appellees asserted grounds for summary judgment before the trial court that are not addressed by CRS on appeal. In granting summary judgment may be affirmed on any ground presented in appellees' motion. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W. 2nd 623, 625 (Tex. 1996). If summary judgment may have been granted on a ground not challenged, failure to address each theory that might support the trial court's rendition of summary judgment requires an affirmance. *See ,e.g., Holloway v. Starnes*, 840 S.W. 2d 14, 23 (Tex. app. - Dallas 1992, writ denied), *cert. denied*, 510 U.S. 828 (1993). Because CRS failed to assign error to all bases upon which the appellees moved for summary judgment on its common-law tort claims, complaint on appeal has been waived.

We hold that the trial court did not err in granting appellees a take-nothing judgment on CRS's common-law tort causes of action.

DTPA Claims

In its ninth issue presented, CRS asserts that the trial court erred in dismissing its DTPA claims against all appellees because they are not

shielded by sovereign immunity. We disagree. To the extent CRS contends that the appellees do not enjoy sovereign immunity because Central Plains and Concho Valley are "imposter" community centers, we have previously rejected this contention. Although CRS presents additional creative arguments as to why the DTPA waives sovereign immunity, none are viable. We hold there was no error.

Section 1983

In its eleventh issue, CRS complains that the trial court erred in dismissing its "section 1983" cause of action. *See* 42 U.S.C.A. § 1983(West 1994 & Supp. 1999). In granting summary judgment against CRS on this claim, the trial court did not specify the basis for its ruling; thus, the summary judgment may be affirmed on any ground presented in appellees' motion. *See Cincinnati Life*, 927 S.W.2nd at 625. Because CRS failed to assign error to all bases upon which the appellees moved for summary judgment on its section 1983 claims, complaint on appeal has been waived.

Injunction

CRS sought to enjoin Concho Valley from membership in the Texas Council, a nonprofit corporation created by community centers from throughout the state in a joint effort to effectuate the centers' responsibilities to mentally challenged Texans. CRS claims that Concho Valley lacks statutory authority to be a dues-paying member of a corporation such as the Council, and that Concho Valley's membership violates that portion of article 3, section 52 of the Texas Constitution prohibiting public entities from holding stock in a corporation. *See* Tex. Const. art. III, § 52.

Concho Valley counters that CRS lacks standing to seek and injunction to void its membership in the Council. CRS argues it has standing because it pays ad valorem taxes on five residential properties to Tom Green County and the City of San Angelo, which, in turn, fund Concho Valley. Alternatively, CRS argues it has standing as a citizen with a peculiar interest adversely affected by the actions of Concho Valley.

We agree with CRS that, generally speaking, a taxpaying citizen has standing to seek and injunction to enjoin public officials from the illegal expenditure of public funds. *See, e.g., Lara b. Williams*, 986 S.W.2d 310,341-15 (Tex. App.-Fort Worth 1999, pet filed) (citing *Osborne v. Keith*, 177 S.W. 2d 198,200 (Tex. 1944); *Hoffman v. Davis*, 100 S.W.2d 94.95 (Tex. 1937)). However, CRS does not seek to enjoin and expenditure by Tom Green County or the City of San Angelo to Concho Valley, or Concho Valley's expenditure to the Council in the form of membership

dues. Rather, CRS seeks to enjoin Concho Valley from remaining a member of the Council. Because CRS has not properly placed itself within the parameters of taxpayer standing, CRS's taxpayer status cannot in itself provide it with the necessary standing to maintain its request for injunction.

CRS argues alternatively that it has standing to seek injunctive relief as a citizen with a special interest adversely affected by Concho's membership in the Texas Council. The general rule is that standing to bring suit depends upon some interest peculiar to the person individually, and not a member of the general public. *See, e.g., Hunt v. Bass,* 664 S.W. 2d 323, 324 (Tex. 1984). More specifically, a person has standing to sue if:

(1) he has sustained, or is immediately in danger of sustaining, some *direct* injury as a result of the wrongful act of which he complains; (2) there is a *direct* relationship between the alleged injury and the claim to be adjudicated; (3) the plaintiff has a *personal* stake in the controversy; (4) the challenged action has caused the plaintiff some *injury in fact*, either economic, recreational, environmental, or otherwise; or (5) the plaintiff is an appropriate party to assert the public interest in the matter as well as his own interest. *Lake Medina Conservation Soc'y, Inc./Bexar-Medina-Atascosa Counties WCID No. 1 v. Texas Natural Resource Conservation Comm'n* 980 S.W.2d 511 (Tex. App.Austin 1998, pet. denied) (emphasis added); *see also Amerada Hess Corp. v. Garza,* 973 S.W.2d 667, 680 (Tex. App.-Corpus Christi 1996, no writ); *Billy B., Inc. v. Board of Trustees,* 717 S.W. 2d 156,158 (Tex. App.-Houston [1st Dist.] 1986, no writ).

CRS concedes that following the rendition of the final summary judgment in this case, it sold its licensed by which it had authorized to provide residential services to mentally retarded persons. CRS asserts that it nevertheless maintains standing to seek an injunction because it leases real property to a company that currently operates residential service centers on that property. In effect, CRS contends that, because it has a financial stake in the profitability of its lessee, who in turn is allegedly affected by Concho Valley's actions.

We conclude that the lessor/lessee relationship between CRS and its tenant does not create the special interest needed to support standing. Assuming Concho Valley's membership in the Council is improper, CRS, as landlord, has not sustained, and is not in danger of sustaining, a direct injury as a result of the membership. Further, the relationship between the possible injury to CRS and the allegedly improper membership of Concho Valley in Council is attenuated, at best. We certainly cannot say the

relationship in direct. Finally, CRS has no personal stake in Concho Valley's membership, and CRS can point to no injury in fact resulting from the membership.

According, we hold that CRS lacks standing to enjoin Concho Valley's membership in the Texas Council. Because lack of standing is a ground for dismissal rather than a take-nothing judgment on the merits, see Alexander v. City of Greenville, 585 S.W. 2d 333,334 (Tex. Civ. App.-Dallas 1979, writ ref'd, n.r.e.), the proper course for this Court is to vacate the portion of the summary judgment ordering that CRS take nothing by its request for injunctive relief, and to render judgment dismissing that portion of the cause in its entirety.

Persons with Mental Retardation Act

In its thirteenth issue presented, CRS urges this Court to find error in the trial court's disposal of its claims under the Persons with Mental Retardation Act ("PMRA"). See Health & Safety Code §§ 591.001-.025 (West 1992 & Supp. 1999) We decline.

The PMRA creates a statutory cause of action to redress violations of the rights of mentally retarded persons. *See id.* § 591.022. However, the right to sue is expressly limited to the person injured, the injured party's parents or guardian, or next friend. Id § 591.022 (d). CRS argues that it is a "person injured" and is therefore entitled to maintain suit. This precise contention has been advanced and rejected previously in *Develo-Cepts, Inc. v. City of Galveston,* 668 S.W.2d 790, 794 (Tex. App.-Houston[14th Dist.]1984, no writ) (PMRA "clearly restricts recovery to mentally retarded persons and to those entitled to bring suit in their behalf"). CRS's conclusory statement that *Develo-Cepts* is erroneous is not persuasive.

Because CRS had no right to sue under the PMRA, the trial court properly granted summary judgment disposing of this claim.

Claims Against Hale County

All of CRS's claims against Hale County are derivative in nature. CRS asserts that because Hale County participated in the creation, controlling, and funding of Central Plains, it is vicarious liable for the wrongdoings and liabilities of Central Plains. Because we have concluded that Central Plains is not liable under any theory advanced by CRS, there can be no vicarious liability imputed to Hale County. We hold that the trial court properly granted summary judgment for Hale County.

Interiocutory Default Judgment

CRS complains in issues three through six that the trial court erred in: (1) refusing to sign and interlocutory default judgment against Tom

Green County after such judgment was rendered on the record in open court; (2) holding a "show cause" hearing; and (4) making findings of fact at the "show cause" hearing.

As a prerequisite to presenting a n argument for appellate review, the record must show that the complaint was first made to the trial court. *See* Tex. R. App. P. 33.1(a). CRS failed to complain to the trial court regarding the default judgment issues presented, and failed to obtain a ruling on any complaint; therefore, CRS has not preserved error for appellate review.
See id.

Even if CRS had preserved error, and assuming CRS is correct that the trial court orally rendered and interlocutory default judgment, CRS's complaints are still without merit. The trial court had broad, virtually unlimited discretion to vacate an interlocutory order prior to its rendition of a final judgment. *See* Tex. R. Cive. P. 329b; *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83,84(Tex. 1993)(trial court has continuing power over interlocutory orders and may set them aside at any time before final judgment is entered). We find no error.

Procedural Rulings

In its final two issues presented, CRS complains of procedural ruling made in connection with the granting of summary judgment. By a scheduling order dated June 6, 1997, the trial court set deadlines after which the parties would not be permitted to file summary judgment argument or evidence. That order gave CRS until July 11, 1997, to complete summary judgment filings, and gave appellees until July 18, 1997. Appellees filed additional summary judgment argument and evidence on July 18. CRS filed and omnibus motion requesting the trial court to grant it leave to reply to the newly filed argument and evidence. The motion was denied. CRS asserts that the June 6 order improperly allowed appellees (as movants) the "last word" and that the trial court erred in denying its omnibus motion.

The record does not show that CRS complained to the trial court about the June 6 order or secured a ruling on any complaint; therefore, the point is waived. See Tex. R. App. P. 331.1. Furthermore, CRS provides no authority to this Court to support its assertion that it was error to allow movants the "last word". Error was therefore waived. *See, e.g., March v. Wallace*, 924 S.W.2d 423,425 (Tex. App.-Austin 1996, no writ). Even if CRS's contention had not been waived, we would still find it to be without merit. The order did not preclude CRS from responding to any additional summary judgment argument or evidence presented by appellees; rather, it

required CRS to seek leave of court before doing so. We do not find and abuse of discretion in the filing of the scheduling order.

As to the denial of the omnibus motion, while the trial court did deny the motion's general request for addition time to respond, the court granted CRS leave to file the only evidence specifically indentified by CRS as necessary to respond to appellee's July 18 filing. The remainder of the omnibus motion, in essence, was simply a request for a continuance for more time to gather potentially responsive evidence. The granting or denied of continuance is within the sound discretion of the trial judge. *See State v. .Crank*, 666 S.W.2d 91,94(Tex. 1984). The denial of a motion for continuance will not be disturbed unless the record shows a clear abuse of discretion. *See id.* Given the extended time frame within which the parties filed and responded to motions for summary judgment; the numerous motions for continuance that had previously been granted in this case; and the fact that CRS was granted leave to file eht evidence it contends was responsive to appellee's July 18 filing, we conclude that the trial court did not abuse its discretion by generally denying CRS's omnibus motion.

CONCLUSION

We hold that CRS lacks standing to seek to enjoin Concho Valley from future membership in the Texas Council; accordingly, we vacate that portion of the trial court's final summary judgment that CRS take nothing by its request for injunctive relief and render judgment dismissing that claim. Having found all remaining issues presented by CRS to be without merit, we affirm the summary judgment in all other respects.

J. Woodfin Jones, Justice

Before Justice Jones, Kidd and Patterson
Affirmed in Part; Vacated and Dismissed in Part
Filed: August 26, 1999
Do Not Publish

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED NOVEMBER 12, 1999

NO. 03-98-00022-CV

CONCHO RESIDENTIAL SERVICE, INC., Appellant

V.

MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority, And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER, Appellees.

APPEAL FROM 119TH DISTRICT COURT OF TOM GREEN COUNTY BEFORE JUSTICES JONES, KIDD AND PATTERSON AFFIRMED IN PART; VACATED AND DISMISSED IN PART ON MOTION FOR REHEARING -- OPINION BY JUSTICE JONES

THIS CAUSE came on to be heard on the record of the court below, and the smae being considered, because it is the opinion of this Court that there was no error in the trial court's summary judgment EXCEPT as to the rendition of judgment with respect to appellant's seeking to enjoin Concho Valley from future membership in the Texas Council: IT IS THEREFORE considered, adjudged and ordered that appellant's motion for rehearing is overruled; that the judgment of this court issued August 26, 1999, is withdrawn, and that the portion of the summary judgment with respect to Concho Residential Services, Inc. taking nothing by its request for injunctive relief is vacated, and judgment is rendered dismissing that claim. The remainder of the summary judgment is affirmed.

It is FURTHER ordered that the appeal, both in this court and the court below, except for the preparation of the Second Supplement to the Clerk's Record which will be paid by the appellees, both in this Court and the court below; and that this decision with a copy of the opinion herein delivered be certified below for observance.

THE SUPREME COURT OF TEXAS

March 9, 2000

Mr. Mark Brown
19 W. Beauregard
San Angelo, TX 76903

[and other counsel of record]

RE: Case Number 99-1269
Court of Appeals Number: 03-98-00022-CV
Trial Court Number: CV92-0444-B

Style: CONCHO RESIDENTIAL SERVICE, INC.
V.
MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, in its capacity as an unincorporated association, its capacity as a mental retardation authority, and as a purported community MHMR center, JAMES YOUNG, ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,
John T. Adams, Clerk

THE SUPREME COURT OF TEXAS

April 27, 2000

Mr. Mark Brown
19 W. Beauregard
San Angelo, TX 76903

[and other counsel of record]

RE: Case Number 99-1269
Court of Appeals Number: 03-98-00022-CV
Trial Court Number: CV92-0444-B

Style: CONCHO RESIDENTIAL SERVICE, INC.
V.
MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, in its capacity as an unincorporated association, its capacity as a mental retardation authority, and as a purported community MHMR center, JAMES YOUNG, ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above styled petition for review.

Sincerely,
John T. Adams, Clerk

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

(3)

No. 00-219

In The

Supreme Court of the United States

CONCHO RESIDENTIAL SERVICE, INC.,

Petitioner,

v.

MHMR SERVICES FOR THE CONCHO VALLEY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals, Third Supreme Judicial District, At Austin, State Of Texas

TOM GREEN COUNTY'S BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent Tom Green County (Texas) respectfully requests that this Court deny the Petition for Writ of Certiorari to review the decision and opinion below.

STATEMENT OF THE CASE

Petitioner's claims grow out of a dispute between Petitioner and Respondent MHMR Services for the Concho Valley (herein "Concho Valley"). The gist of Petitioner's complaint is that Concho Valley failed to advertise and otherwise promote Petitioner's business. However, instead of limiting the dispute to Concho Valley, Petitioner eventually sued numerous individuals as well as virtually every entity which had any sort of real or imagined connection to Concho Valley (including Respondent Tom Green County).

It did not take the trial court long to find the flaws in Petitioner's claims and, consequently, the trial court undertook to end the case by a series of orders which granted take-nothing motions for summary judgment.[1] Petitioner, in a desperate attempt to salvage a case, engaged in what the federal courts most charitably call "seriatim pleading," being an attempt to stay one step ahead of the trial court by filing a series of amended and supplemental pleadings – the goal being to add new claims and parties faster than the trial court can eliminate

[1] CR1077,1281,1441,3929.

claims and parties.[2] This practice of seriatim pleading has been expressly condemned by the federal courts[3] and is, at the very least, disfavored by the Texas bench and bar.

Moreover, each of Petitioner's filings were voluminous,[4] Petitioner apparently being intent on accomplishing by volume what it could not accomplish by substance. Petitioner thereby shotgunned issues. Each filing added new issues as well as new phases and shades of old issues.

The practice of shotgunning by volume and the practice of adding new claims and variations on old claims carried over into the Texas Third Court of Appeals, wherein Petitioner tendered and sought leave to file a brief that exceeded 150 pages. Petitioner was ultimately granted leave to file a 65-page brief (exceeding by fifteen pages the standard page limitation for appellate briefs).

Respondent Concho Valley, the entity which allegedly wronged Petitioner, did nothing which would support the relief sought by Petitioner. Nevertheless,

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[2] 1st Amended Petition, CR2; 2nd Amended Petition, CR78; 3rd Amended Petition, CR1123; 4th Amended Petition, CR1331; 1st Supplemental Petition, CR2383.

[3] *See Union Planters National Leasing, Inc. v. Woods*, 687 F.2d 117, 121 (5th Cir. 1982) (affirming denial of leave to amend pleadings because said amendment was offered only after summary judgment was granted).

[4] *See e.g.* 1st Amended Petition, CR2 (64 pages); 2nd Amended Petition, CR78 (64 pages); 3rd Amended Petition, CR1123 (64 pages); 4th Amended Petition, CR1331 (102 pages); Amended Response to Motion for Summary Judgment, CR255 (50 pages); Response to Motion for Summary Judgment, CR2971 (54 pages).

from Tom Green County's perspective, it is important to note that Tom Green County is not alleged to have been involved in the conduct by which Petitioner claims to have been harmed (the alleged failure to advertise and otherwise promote Petitioner's business). Instead, Tom Green County's liability is alleged to flow from the fact that Tom Green County is one of the entities which formed Concho Valley.

Tom Green County maintains, and the Texas courts agreed, that Tom Green County – in creating Concho Valley – did no more than that which Tom Green County was expressly authorized to do under Texas law. It helped form an independent and autonomous governmental entity that delivered governmental services.

It is also important to note that in the trial court Petitioner sought relief under the Texas antitrust act – and not under the federal antitrust act. Petitioner merely alludes to this fact in its procedural history. *See* Petition for Writ of Certiorari (herein PWC), p. 2 (Petitioner brought suit under Texas antitrust act). This fact should be stressed because the questions presented, and Petitioner's argument, might lead one to believe that relief was sought under the federal antitrust act. To the extent that federal antitrust law was raised below, it was presented only as an aid to construction of Texas antitrust law. The Texas antitrust act adopts federal antitrust exemptions. (Appendix, p. 6 – Section 15.05(g))

Furthermore, it should be stressed that Petitioner did not seek relief in the trial court under either federal Medicaid law or federal disability discrimination statutes. Petitioner structures its argument as if such relief had

been sought. *See e.g.* PWC, p. i (Question 4 – reference to Medicaid law) & p. 15 (reference to the Americans With Disabilities Act).

Tom Green County contends that Petitioner's analysis and resolution of the questions presented is faulty. However, this Brief in Opposition focuses for the most part on procedural defects which weigh against granting writ and on other issues not raised by Petitioner.

Nevertheless, Tom Green County does not accept Petitioner's "Statement of the Case." A number of assertions set out in the Petition for Writ of Certiorari are supported by neither law nor fact, including the following:

- that Concho Valley is an unincorporated association, pp. 2 & 14;
- that Tom Green County is a principal in an unincorporated association, pp. 2 & 14;
- that the trial court dismissed Petitioner's suit, p. 2 (the trial court in fact rendered a take-nothing judgment, Appendix, p. 21);
- that certain alleged discrimination appears to violate federal law, p. 6;
- that the Texas antitrust act applies to community centers and the counties which form and fund them, p. 13;
- that Tom Green County is a controlling principal of Concho Valley, p. 14;
- that Tom Green County is vicariously liable for Concho Valley's alleged antitrust violations, p. 14;

•that Petitioner is suing under a private attorney general statute which benefits consumers of mental retardation services, p. 15;

•that a lawfully organized community center is an unincorporated association, pp. 16-17;

•that a lawfully organized community center is operated by the governmental agencies which establish it, pp. 16-17;

•that a community center is not a distinct, self-supporting entity, p. 17; and,

•that there is no evidence of a good faith, colorable attempt to create a community center, p. 28.

Petitioner has also omitted a number of material facts. These omitted facts are discussed below.

REASONS FOR DENYING THE WRIT

1. Petitioner has failed to establish jurisdiction.

2. Petitioner has failed to demonstrate that the questions presented were raised in the lower courts.

3. Petitioner has failed to demonstrate that Petitioner has standing to raise the questions presented.

4. Petitioner's argument is necessarily dependent upon a construction and application of certain aspects of Texas law, which construction and application was resolved against Petitioner by the courts of Texas in circumstances under which the United States Supreme Court has traditionally declined to undertake an independent analysis of state law.

5. Petitioner has omitted material facts.

6. The Texas Third Court of Appeals identified an alternative independent state-law ground for determining that Tom Green County can have no antitrust liability.

7. Respondent Tom Green County presented other alternative independent state-law grounds for determining that Tom Green County can have no liability, which grounds were not completely reached by the Third Court of Appeals. These grounds are not addressed by Petitioner.

ARGUMENT

Jurisdiction

The questions raised by Petitioner are not truly federal questions such as would support Supreme Court jurisdiction. *See* 28 U.S.C. § 1257. Questions 1-4 actually touch and concern a construction of the Texas antitrust statute. As noted above, to the extent that federal antitrust law was raised below, it was presented only as an aid to construction of Texas antitrust law.

Although Question 5 seemingly raises a federal question – because it concerns due process – the issue actually touches and concerns an issue of local interest (entity formation under Texas law) which issue was resolved by the Texas courts in circumstances under which the United States Supreme Court has traditionally declined to undertake an independent analysis of state law. The Supreme

Court considers itself bound by a state court's construction of a state statute. *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993).

Preservation

Furthermore, Petitioner has not demonstrated that the questions presented were properly raised (preserved) in the lower courts. For example, in undertaking to establish that Questions 1-4 were raised in the trial court, Petitioner relies upon a summary judgment response which was directed against motions for summary judgments filed by parties other than Tom Green County. (PWC, pp. 8-9) Because this summary judgment response (CR255) does not reference Tom Green County's motion for summary judgment, Petitioner has not demonstrated that Questions 1-4 were preserved for the purpose of reviewing the summary judgment granted to Tom Green County.

Likewise, Petitioner has failed to demonstrate that Question 5 (due process) was preserved for review. Petitioner alleges that Question 5 was raised in the trial court by a different summary judgment response (CR2994-2999), wherein Petitioner "pleaded that fact issues existed regarding whether a contract had been signed to create CONCHO VALLEY and whether the principals had made a colorable, good faith effort to establish CONCHO VALLEY." (PWC, p. 10)

However, because this entity-formation issue was part and parcel of numerous theories of recovery, including state-law theories of recovery,[5] Petitioner has not demonstrated that the summary judgment response relied upon by Petitioner (which does not tie the entity-formation issue to a due process complaint) is sufficient to raise the due process question as an issue which would defeat the motions for summary judgment. The 54-page summary judgment response relied upon by Petitioner does not even mention due process. (CR2971-3024)

Although Petitioner also alleges that the due process question was raised by its pleadings and by its trial brief (PWC, p. 10), under Texas summary judgment practice neither pleadings nor trial briefs can raise issues which will avoid summary judgment. *See Cook Composites, Inc. v. Westlake Styrene Corporation*, 15 S.W.3d 124, 140 (Tex.App. – Hou. [14th Dist.] 2000, pet. dism'd) (for the purpose of avoiding summary judgment, an issue is waived if not raised in both the pleading and the response to the motion for summary judgment); *Cornerstone Municipal Utility District v. Monsanto Company*, 889 S.W.2d 570, 574 (Tex.App. – Hou. [14th Dist.] 1994, writ den.) (summary judgment could not be avoided by issue raised in brief). Under Texas practice, in order to raise an issue which will

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[5] The entity-formation issue was the basis for complaint under a number of state-law theories of recovery, including alleged violations of the Deceptive Trade Practices Act (CR1408-1411 – alleging that defendants misrepresented Concho Valley to be a lawfully formed community center) and the Persons With Mental Retardation Act (CR1422 – alleging that defendants allowed Concho Valley to pose as a lawfully formed community center).

avoid summary judgment, the issue must be expressly set out in the response to the motion for summary judgment. *Cornerstone*, 889 S.W.2d at 574.

Additionally, Petitioner has failed to demonstrate that the questions presented were raised in the Supreme Court of Texas. For jurisdiction, Petitioner relies upon 28 U.S.C. § 1257, which authorizes the United States Supreme Court to review final judgments or decrees rendered by "the highest court of a State in which a decision could be had." However, Petitioner complains about the judgment of the Third Court of Appeals – an intermediate Texas Court – and makes no effort to demonstrate that the questions presented were specifically raised in the Supreme Court of Texas (Texas' highest court).

Moreover, a number of additional issues argued in the Petition for Writ of Certiorari are not shown to have been raised in the Texas courts. These issues include the applicability of federal Medicaid law (PWC, p. i), the applicability of the Americans With Disabilities Act (PWC, p. 15), and the issue of whether the Texas community center statute is void for vagueness (PWC, pp. 26-27).

Standing and Alternative State-Law Ground

Furthermore, Petitioner has failed to demonstrate that Petitioner has standing to raise the questions presented. The question of standing is not subject to waiver. *United States v. Hays*, 515 U.S. 737, 742 (1995). It is the burden of the party who seeks the exercise of jurisdiction to allege facts showing that he is a proper party to invoke judicial resolution of the dispute. *Hays*, 515 U.S. at 743.

The constitutional minimum of standing contains three elements: (1) the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; and, (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Hays*, 515 U.S. at 742-43.

As regards injury in fact, Petitioner to a large extent complains about injury allegedly sustained by persons other than Petitioner and in this regard has failed to demonstrate that Petitioner has suffered an injury in fact. *See e.g.* PWC, p. i (complaining about conduct alleged to impact disabled citizens), p. 9 (complaining that consumers and their families were denied the right to make placement decisions; complaining that consumers were denied right to choose providers), p. 12 (complaining that mentally retarded citizens were denied vital services), p. 15 (arguing that the ADA directs that disabled citizens not be denied the benefit of a public entity's services and activities). A generalized grievance against allegedly illegal governmental conduct will not support standing to invoke the federal judicial power. *Hays*, 515 U.S. at 743.

Petitioner also lacks standing to complain about Concho Valley's status and about the method by which Concho Valley's status was determined. There is simply no cause in fact between Concho Valley's status and the injury allegedly sustained by Petitioner. For example, the record does not show that the injury allegedly sustained by Petitioner would have been avoided if the entities which formed Concho Valley had entered into the written

contract that Petitioner alleges to be lacking (being the procedural defect alleged by Petitioner). Furthermore, under Texas law the status of an entity created and existing under color of a valid law may be challenged by the state (via a quo warranto proceeding) but may not be challenged by a private individual. *Walling v. North Central Texas Municipal Water Authority*, 348 S.W.2d 532, 533 (Tex. 1961).

Finally, as regards standing, Petitioner has failed to demonstrate a likelihood that the injury alleged will be redressed by a favorable resolution of the antitrust questions presented (Questions 1-4). Even if these questions were resolved in favor of Petitioner, the outcome would not be changed – the summary judgment on the antitrust claims is supported by alternative independent state law grounds.

For example, in Question 1 Petitioner argues that the LGAA antitrust exemption permits antitrust injunctive relief but not antitrust damages. (PWC, p. i) However, Petitioner did not seek injunctive relief against Tom Green County. (CR2,78,1123,1331,2383) Therefore, the resolution of Question 1 cannot affect Tom Green County – the question is moot.

For further example, the Texas Third Court of Appeals identified an alternative state-law ground for determining that Tom Green County can have no antitrust liability, which ground does not touch and concern any federal question (assuming only for the sake of argument that there is a federal question). In this regard, the Third Court of Appeals noted that the Texas antitrust act contains its own state action exemption (herein, the Texas

state action exemption) which prevents Tom Green County from having any antitrust liability. (Appendix, p. 26) This application of the Texas state action exemption does not touch and concern the LGAA (Question 1), the *Parker* state action doctrine (Questions 2-4), or the means by which Concho Valley was formed (Question 5).

As regards the Texas state action exemption, it must be noted that Petitioner, in copying the Texas Third Court of Appeals opinion into the Appendix, omitted the following key paragraph:

> In addition, the Texas Act includes its own state-action exemption. Section 15.05 of the Antitrust Act specifically exempts "actions required or affirmatively approved by any statute of this state . . . or by a regulatory agency of this state . . . acting under . . . statutory authority vesting the agency with such power." See Bus. & Com.Code § 15.05(g). Accordingly, we hold that the trial court properly granted a take-nothing summary judgment against CRS on its antitrust claims against Concho Valley and Central Plains.

Compare Concho Residential Services, Inc. v. MHMR Services For The Concho Valley, 1999 WL 644727, unpublished slip opinion at p. 3 (Tex.App. – Austin 1999, rev. den.) (paragraph included) *with* the text of the opinion as copied at page 25 of the Appendix (paragraph omitted).

The omitted paragraph serves to place in context the Court of Appeals' determination that the Texas state action exemption precludes Tom Green County from having any antitrust liability. The Court of Appeals held as follows:

> Further, as previously noted, the Texas Act also includes its own state-action exemption, which we conclude is expansive enough to cover the County's participation in the anti-competitive scheme. See id. § 15.05(g). Accordingly, we hold that the trial court did not err in dismissing CRS's antitrust claims against Tom Green County.

(Appendix, p. 26)

Omission of Material Facts

The omission discussed above and Petitioner's omission of other material facts (such as facts which are material to the creation of an MHMR community center, discussed below) will alone justify denial of the Petition for Writ of Certiorari. *See* Rules of the Supreme Court of the United States, Rule 14(h)(4) (failure to accurately present facts will justify denial of petition).

Petitioner argues that the entities which formed Concho Valley did not enter into a written contract and contends that a statutory prerequisite to making Concho Valley an MHMR community center was, as a consequence, never met. Petitioner would have the courts "invalidate Concho Valley and Central Plains' 30-year history as legally created community centers for lack of written contracts at their inception." (Appendix, p. 28 – Texas Third Court of Appeals opinion)

However, the Texas Third Court of Appeals held that Concho Valley was formed under the original (1965) version of the statute, which statute did not require – as a condition to establishing a community center – that the

participating local agencies enter into a formal contract (much less a written contract). (Appendix, pp. 26-27) Instead, the original statute provided that one or more participating agencies "may cooperate, negotiate and contract with each other through their governing bodies to establish and operate a community center." (Appendix, pp. 26-27) The Court of Appeals held that the phrase "cooperate, negotiate and contract" is broad enough to permit agencies to establish a community center through mere cooperation – without the formalities of a contract. (Appendix, p. 27)

Petitioner takes issue with the Texas Third Court of Appeals' statutory construction. Petitioner invites the United States Supreme Court to conduct its own review of the Texas community center statute. Petitioner would have this Court construe the statute to require the participating local agencies to form the community center by written contract.

However, as noted above, this Court considers itself bound by a state court's construction of a state statute. *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993). The Court even defers to lower federal court constructions of a state statute unless such constructions constitute plain error. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 880 (1992). The Court defers to the lower federal courts because it considers them to be better schooled in and more able to interpret the laws of their respective states. *Casey*, 505 U.S. at 880.

Under this rationale, the Court would properly decline to apply its own construction of the Texas statute which governs formation of community centers. For the

same reasons, this Court would properly decline to construe the Texas antitrust act in a manner that is inconsistent with the construction applied by the Texas Third Court of Appeals.

The summary judgment record (portions of which are not discussed by Petitioner) conclusively establishes that prior to September 1, 1969 (when the statute was amended to require a contract – but not a written contract) several entities had cooperated to establish Concho Valley as a community center. In this sense, there was a meeting of the minds, and thus a contract, if such be necessary. At the very least, the minimum requirements of due process were satisfied.

For example, the Board of Trustees that operates Concho Valley[6] met as early as 1966 and adopted a constitution and by-laws as early as 1967. (CR1607-20) Additionally, by a 1968 letter to Tom Green County's county judge, the chairman of Concho Valley's Board of Trustees wrote that the Board "has been charged by the Commissioners Court and other local agencies with the responsibility of developing a plan to provide mental health and mental retardation services to the residents of Tom Green County." (CR1968) Furthermore, on October 15, 1984 (long before this controversy arose) the Tom Green County Commissioners Court approved a recommendation of the liaison representative committee (recommending the reappointment of Concho Valley trustees) which

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[6] The summary judgment record often contains reference to the Mental Health/Mental Retardation Center for Greater West Texas. That is the name by which Concho Valley was originally known. (CR1988-89)

committee reported that several cooperating agencies (Angelo State University, City of San Angelo, San Angelo ISD, and Tom Green County) had established Concho Valley in 1966. (CR2489-90)

If written documentation should be deemed necessary, then the summary judgment record contains an abundance of additional writings which, considered with the foregoing, are sufficient to bind the respective entities to having established Concho Valley. In 1966 the City of San Angelo agreed to provide water and other services to Concho Valley (CR1970); as early as 1966 and in successive years the San Angelo School District Trustees appointed delegates to select Concho Valley's board of trustees (CR3649,3653,3658); as early as 1967 the Tom Green County Commissioners Court approved funding for "the County's share of office and secretarial expenses for" Concho Valley (CR1966,1988-89); in 1968 the Commissioners Court again approved Concho Valley funding and approved appointments to the committee which was to select Concho Valley's trustees (CR1967,2455); as early as 1968 the San Angelo School District approved Concho Valley's trustees' request for eight months of funding and instructed the school superintendent to inform Concho Valley's trustees that the School District is "fulfilling their responsibility" by furnishing teachers in the field of special education (CR3650-51); in 1968 the School District let Concho Valley lease school-owned buildings without charge (CR3654-55); in 1968 Concho Valley's trustees requested additional funding from the Tom Green County Commissioners Court and the Commissioners Court authorized three years of funding for "the county's share" in the establishment of a Concho Valley clinic

(CR1968,1971); in 1968 the Tom Green County Commissioners Court filed for record Concho Valley's Plan for Services (CR1972); as early as August 10, 1968 Concho Valley had applied for and had been approved for a state grant (CR1988-89,1654-55); on January 28, 1969 Concho Valley's chairman of the board of trustees and Concho Valley's executive director reported to the San Angelo City Council that Tom Green County had agreed to fund a local MHMR center for San Angelo (CR1985,1988).

Beyond the year 1969, there is additional evidence supporting the conclusion that Concho Valley had been established (by written contract, if that be necessary). On August 29, 1983 the Tom Green County Commissioners Court approved and authorized the county judge to sign a contract with Concho Valley, a copy of such signed contract being in the record, whereby the County retained Concho Valley to perform MHMR services (CR2483,2485,2478-2481); the Tom Green County Commissioners Court approved reappointments to Concho Valley's board of trustees covering the years 1970-1994 (CR2457-2527); Concho Valley's board selection policies were formally incorporated into a document entitled, "Board Appointment Procedures" which was adopted by the sponsoring agencies in 1989 (CR3859-64,3871-77).

Other Alternative State-Law Grounds Not Completely Reached

Finally, Tom Green County presented other alternative independent state-law grounds for determining that Tom Green County can have no liability, which grounds were not completely reached by the Texas Third Court of

Appeals and which grounds are not addressed by Petitioner. In this regard, Tom Green County argued: (1) that the Texas antitrust act does not waive Tom Green County's own sovereign immunity, (2) that even if Tom Green County could have antitrust liability or other liability, the summary judgment evidence conclusively negates any liability; (3) that Tom Green County cannot be derivatively liable for any wrong committed by Concho Valley because there is no statutory basis for such derivative liability; (4) that even if there were a statutory basis for such derivative liability, any immunity enjoyed by Concho Valley inures to the benefit of Tom Green County, (5) that Concho Valley's agents are entitled to official immunity (such immunity inuring to the benefit of Concho Valley and to Tom Green County to the extent the County is alleged to be derivatively liable); and, (6) that even if the parties lacked sovereign and official immunity, Tom Green County can have no liability because the County committed no offense, Concho Valley committed no underlying offense, and other principles of law preclude imputing Concho Valley's conduct to the County. (Tom Green County's Appellee's Brief, pp. 5-7, 23-32)

Because a Texas county is a body politic of the State, a Texas county (like the State of Texas) is not liable for the torts of its officials, officers, agents, servants, or employees, and no recovery of damages can be had against a county unless liability be created by statute. *Wade v. Jackson County*, 547 S.W.2d 371, 373 (Tex.Civ.App. – Corpus Christi 1977, writ ref'd n.r.e.); *see Firemen's Insurance Company of Newark v. Board of Regents*, 909

S.W.2d 540, 543 (Tex.App. – Austin 1995, writ den.) (counties are not responsible for damages caused by neglect or wrong committed by their officers).

Where there is any uncertainty as to whether the sovereign immunity of a Texas governmental entity has been waived by the Texas Legislature, that uncertainty necessitates a finding that immunity has not been waived. A Texas governmental entity is immune from both suit and liability in the absence of an express waiver. *Wickham v. San Jacinto River Authority*, 979 S.W.2d 876, 879 (Tex.App. – Beaumont 1998, no pet.); *see Austin Transportation Study Policy Advisory Committee v. The Sierra Club*, 843 S.W.2d 683, 690 (Tex.App. – Austin 1992, writ den.) (absent an express waiver of governmental immunity from liability, a party cannot obtain an award of attorney fees from a governmental unit). If the Texas Legislature undertakes to waive sovereign immunity, it must do so by clear and unambiguous language. *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980).

The uncontroverted summary judgment evidence establishes that Tom Green County did not participate in, approve, or ratify the wrongful acts by which Petitioner alleges to have been harmed. The county commissioners court is a Texas county's governing body. *Nueces County v. DePena*, 953 S.W.2d 835, 836 (Tex.App. – Corpus Christi 1997, no writ). A Texas county can act only through its commissioners court. *Id.*; *Renfro v. Shropshire*, 566 S.W.2d 688, 692 (Tex.Civ.App. – Eastland 1978, writ ref'd n.r.e.).

The uncontroverted affidavit of the former County Judge of Tom Green County establishes the following: (1) the Tom Green County Commissioners Court did not

participate in the operations, administration, management, or policy-making of Concho Valley; (2) the only actions taken by the Commissioners Court in relation to Concho Valley was in funding and in appointing trustees; and (3) the Commissioners Court did not commit, participate in, collude with, authorize, or ratify Concho Valley's claimed acts or omissions. (CR1074-75)

Even if Tom Green County could be derivatively liable for Concho Valley's conduct, any immunity enjoyed by Concho Valley would inure to the benefit of Tom Green County. *See DeWitt v. Harris County*, 904 S.W.2d 650, 654 (Tex. 1995). Additionally, the official immunity enjoyed by Concho Valley's agents inures to the benefit of Tom Green County to the extent that the County is alleged to be derivatively liable for the conduct of Concho Valley. *See DeWitt*, 904 S.W.2d at 654.

CONCLUSION

For the reasons set out above, the Petition for Writ of Certiorari should be denied.

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No. 00-219

IN THE

Supreme Court of the United States

CONCHO RESIDENTIAL SERVICES, INC.,

Petitioner,

v.

MHMR SERVICES FOR THE CONCHO VALLEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD JUDICIAL DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Neither corporate respondent herein has a parent corporation and no publicly held company owns 10% or more of the stock of either corporate respondent.

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REASONS FOR DENYING THE WRIT

Petitioner presents no compelling reasons for grant of a writ of certiorari and no substantial question of federal law meriting the Court's consideration. Rather, Petitioner's claims center around its belief that the Texas Court of Appeals has improperly interpreted and applied Texas' Free Enterprise and Antitrust Act of 1983.[1] While the Texas antitrust statute looks to federal antitrust law as a model for state standards, the decision to incorporate these standards is itself the product of state, not federal law. Even granting the tangential relationship of federal law to this controversy, the Texas Court of Appeals' decision is well supported by independent and adequate state law grounds, consisting of state law antitrust exemptions that do not rely at all on guidance from federal law. Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I.

THE DECISION OF THE TEXAS COURT OF APPEALS IS SUPPORTED BY INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court will not review a state court decision that rests upon independent and adequate grounds, even if the case also implicates a federal question. *Fox Film Corp. v. Muller*, 296 U.S. 207, 209-10 (1935). If the state ground alone is dispositive, then the Court lacks jurisdiction.

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1. Texas Free Enterprise and Antitrust Act of 1983, 68th Leg. R.S., ch. 519, 1983 Tex. Gen. Laws 3010, codified at Tex. Bus. & Com. Code § 15.01 *et seq.* (West 1994).

E.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

In this case, an independent and adequate state ground of decision exists as to each of the Petitioner's issues directed at the Court of Appeals' disposition of its antitrust claims. *See* Questions Presented, Issues 1-4. Petitioner's Issues 2-4 address the incorporation of the federal "state action" doctrine into the Texas antitrust statute. While it is true that the Court of Appeals discussed and relied in part on the federal antitrust "state action" doctrine in disposing of Petitioner's appeal, it also recognized that an independent and adequate state law antitrust exemption was dispositive of the issues before it. After discussing the federal "state action" doctrine, the Court of Appeals went on to note:

> [i]n addition, the Texas Act includes its own state-action exemption. Section 15.05 of the Antitrust Act specifically exempts "actions required or affirmatively approved by any statute of this state . . . or by a regulatory agency of this state . . . acting under . . . statutory authority vesting the agency with such power." *See* Bus. & Com. Code § 15.05(g). Accordingly, we hold that the trial court properly granted a take-nothing summary judgment against [Petitioner] on its antitrust claims against Concho Valley and Central Plains.[2]

---

2. The passage quoted above from the Court of Appeals' opinion was omitted from the version of that opinion included in Petitioner's Appendix. It is included at page 7 of the Court of Appeals' Slip Opinion, which corresponds to page 25 of Petitioner's Appendix 8.

Recognizing the application of an independent, state law antitrust exemption to the facts of the case, the Court of Appeals of affirmed the trial court summary judgment on this ground as well.

The same analysis applies to Petitioner's Issue 1, addressing the scope of the remedies provision of the Local Government Antitrust Act of 1984. *See* 15 U.S.C.A. §§ 34-36 (West 1997). The Court of Appeals did invoke the provisions of this act in disposing of some of Petitioner's claims against a single party, Tom Green County. Pet. App. 8 at 26. The Court of Appeals, however, went on to determine, as an alternative ground for affirming the trial court:

> Further, as previously noted, the Texas Act also includes its own state-action exemption, which we conclude is expansive enough to cover the County's participation in the anti-competitive scheme. . . . Accordingly, we hold that the trial court did not err in dismissing CRS's antitrust claims against Tom Green County.

Id. (citation omitted). In each identified instance, the presence of an independent and adequate state law basis for the Court of Appeal's opinion and judgment deprives this Court of jurisdiction.

II.

PETITIONER PRESENTS NO COMPELLING REASON FOR GRANT OF ITS PETITION FOR CERTIORARI.

This Court grants certiorari only for "compelling reasons." Supreme Court Rule 10. Typically, this means either: 1) a conflict exists between the state court decision under review and that of another state court of last resort, a federal appeals court or "relevant decisions of this Court"; 2) a substantial departure by the court under review "from the accepted and usual course of judicial proceedings"; or 3) a decision on "an important question of federal law that has not been, but should be, settled by this Court. . . ." *Id.* Petitioner identifies no conflicts, complains of no egregious judicial conduct and makes no showing of any important, unsettled federal issue for this Court to decide. Instead, the Petition focuses primarily on narrow areas of disagreement with the Court of Appeals' decisions on the scope and interpretation of state antitrust law. Review of Petitioner's individual Questions Presented confirms this overall picture.

None of Petitioner's issues raise a substantial, important federal question. Issue 1, addressing the meaning of the Local Government Antitrust Act of 1984 ("LGAA") and its application to Respondent Tom Green County, is answered by the plain words of the statute and by numerous federal court decisions. There is no dispute that the LGAA immunizes local government entities from damages, but not from injunctive relief. *See* 15 U.S.C.A. § 35(a); *See, e.g.*, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 369 n.2 (1991). Petitioner, however, did not seek antitrust based injunctive relief, but only damages,

against Tom Green County. Accordingly, the application of the LGAA to requests for injunctive relief was not an issue either "pressed or passed" upon by the Court of Appeals. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 218 (1983). As far as the LGAA is applicable in the circumstances of this case, the Court of Appeals correctly relied on the LGAA to immunize Tom Green County from liability for damages. Moreover, as explained above, the Court of Appeals clearly indicated that the LGAA was an alternative ground for affirmance, which the Court of Appeals coupled with independent and adequate state law immunity for Tom Green County. Pet. App. 8 at 26.

Likewise, the issues raised by Petitioner concerning the scope of "state action" immunity are not worthy of this Court's attention. In Issue 2, Petitioner simply complains that the Court of Appeals did not adequately explain its reasoning for recognizing "state action" immunity as an element of Texas antitrust law in the circumstances of this case. Petitioner provides no citation or analysis that even begins to explain what federal law issue this complaint invokes, other than a conclusory, unsupported reference to "due process." Pet. for Cert. at 14. Moreover, with all due respect, Petitioner's complaint is belied by the Court of Appeals' opinion, which is clear and comprehensive in its discussion of the incorporation of federal "state action" immunity as a component of the Texas antitrust statute.

In Issue 3, Petitioner complains that Respondent Concho Valley is not a state agency and hence not entitled to "state action" immunity. Again, this argument raises no federal question at all. States are free in the exercise of their own sovereignty to determine the categories of agencies necessary to carry out state governmental policies. Petitioner's

disagreement with the State's creation of Concho as an agent of state policy for the care of the mentally retarded is no more than a quarrel with the Court of Appeals on a matter of state law. *See, e.g., Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945) (matters of state law not Court's concern). Additionally, Petitioner's analysis of whether Concho is a proper state agency depends on evaluation of the particulars of Concho's creation and activities, viewed in light of a comprehensive regulatory scheme which is the product of state legislation. These are matters as to which this Court should defer to the state courts below. *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 495 (1982) (in reviewing challenge to state law, Court should consider state court limiting construction).

As with Petitioner's other antitrust issues, Issue No. 4 involves matters of state, rather than federal law. Specifically, Petitioner argues that the Court of Appeals "lacked a colorable basis for its conclusion that ¶ 15.04 of the Texas Free Enterprise & Antitrust Act of 1983 incorporates the federal *Parker* 'state action' doctrine." Pet. for Cert. at 22. The choice of immunities that are to be included in a state antitrust statute is manifestly a matter of state law. The Texas Legislature could have legislated "state action" immunity identical to that articulated by the Court of Appeals in its opinion without reference to federal law, or by reference to the antitrust jurisprudence of some other state. So long as the Texas Legislature limited the scope of that immunity to actions brought under the state antitrust statute, that immunity would unquestionably be the product of state law. By the same reasoning, the decision to incorporate some portion of federal antitrust jurisprudence as **a model** for purely state-law antitrust application involves a choice within the prerogative of the state sovereign.

Finally, Petitioner's Issue No. 5 likewise raises no credible question of federal law. Reduced to its essence, Petitioner's complaint here is that the Concho Valley Community Center was initially created without the execution of a written contract among the local government entities involved in forming the community center. Petitioner alleges that unless the statute authorizing creation of the community center[3] is interpreted to include a requirement that the creation be pursuant to a written contract, the statute would be void for vagueness. Pet. for Cert. at 26-27. The remainder of Petitioner's discussion under this point, however, is simply a critique of the Court's interpretation of the statute in question and of the adequacy of the Respondents' efforts to comply with the statute in creating an MHMR community center; again, this critique raises purely state law issues.

Petitioner utterly fails to demonstrate why the requirement of a contract documenting the creation of the community center is essential to the constitutionality of the statute authorizing the center's creation. The Court of Appeals held, as a matter of state law statutory interpretation, that the use of a contract as a creating document was not mandatory. Pet. App. 8 at 27. If the reference to a contract in the enabling statute is left out, the statute nevertheless directs that "one or more [specified local agencies] may cooperate [and] negotiate . . . with each other through their governing bodies to establish and operate a center." MHMR Act ¶ 3.01. In combination with the other terms and provisions of the original MHMR Act, it is plain that the statue provides ample notice to members of the public of its

3. Mental Health and Mental Retardation Act ("MHMR Act"), 59th Leg., R.S., Ch. 67, 1965 Tex. Gen. Laws 165-174, initially codified at Tex. Rev. Stat. Ann. art. 5547-201 *et seq.*

intent to establish community centers as an aid to the State's mentally retarded citizens and the means to carry out that intent. *See, e.g., Village of Hoffman Estates*, 455 U.S. at 503 (vagueness review inquires whether law affords fair warning of what is proscribed). Moreover, since the statute complained is not directed at regulating the conduct of any individual or class of persons, it is difficult to see how Petitioner's vagueness challenge has any meaning as applied to the statute in question. In short, Petitioner's contentions regarding the notice provided by the statute are groundless.

CONCLUSION

When all is said and done, the Petition accomplishes no more than to quarrel with the Court of Appeals' interpretation and application of state antitrust law, in the context of a state antitrust suit pressed against a state governmental entity. To the extent the Petition discusses the incorporation of federal "state action" immunity as an element of the Texas antitrust statute, the Petition reveals no important federal question and no threat to the uniform application of well established federal jurisprudence as a result of the Court of Appeals' unpublished opinion, with its limited application to Texas law. The due process claims purportedly raised by the Petition are, on their face, entirely lacking in substance and in merit.

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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(5)

No. 00-219

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

CONCHO RESIDENTIAL SERVICE, INC., Petitioner

VS.

MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER,, Respondents

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On Petition For Writ Of Certiorari to the Court Of Appeals, Third Supreme Judicial District, at Austin, State of Texas, No. 03-98-00022-CV

REPLY BRIEF FOR PETITIONER

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Abbreviations

TGC Br.	Brief In Opposition Of Tom Green County
CV Br.	Brief In Opposition Of Concho Valley et al.
Pet.	Petition for writ of certiorari
Pet. App.	Appendix to petition for writ of certiorari
CR	Clerk's Record

Corporate Disclosure

Petitioner's prior statement (Pet. i) remains valid.

I. Compelling Need For Review

Laws protecting mentally retarded citizens are worth little if ignored and unenforced. The Factual Chronology (Pet. 2-8) shows CONCHO VALLEY acted as if it were above the law, and its principals TOM GREEN COUNTY and CITY OF SAN ANGELO seem to look the other way. The courts below have reinforced that cavalier attitude.

Texas' Third Court Of Appeals has mis-stated federal antitrust law and ignored federal medicaid law in exempting from the Texas antitrust act wrongful conduct that injured CRS and betrayed Texas' most vulnerable citizens. Review will shine the rule of law upon a dark corner of public administration in Texas, and caution courts against careless use of *Parker* to excuse public antitrust violators.

II. Not Publishing Opinion Should Not Evade Review

The Third Court Of Appeals' order to not publish its precedent-laden opinion should not exempt it from Supreme Court review. State courts should not be able to use non-publication to avoid review of their mishandling of federal law. Review will show courts that federal law cannot be misused, nor review circumvented, by so transparent a ploy.

III. Independent State-Law Ground Ignores Medicaid Laws, Agency Policies

The Third Court Of Appeals alternately held, twice, that the Texas antitrust act's own "state action" exemption, in Tex. Bus. & Com. Code §15.05 (g) (West 1994), immunizes the respondents' injurious conduct. Respondents make much of this, yet, like the state appeals court, never come to grips with petitioner's analysis. Petitioner addressed that inde-

pendent state-law ground twice, noting medicaid law and state agency policies in no way "required or affirmatively approved", but rather forbid, CONCHO VALLEY's refusing to offer inquiring parties the choice of CRS' homes (Pet. 13, 14, 23-26).

Petitioner's Appendix inadvertently omitted from page 25 a paragraph of the Third Court of Appeals' opinion containing the alternate holding with respect to CONCHO VALLEY. The undersigned counsel takes full responsibility and sincerely apologizes to the Court for the omission. The omitted paragraph[1] reads as follows:

> *In addition, the Texas Act includes its own state-action exemption. Section 15.05 of the Antitrust Act specifically exempts 'actions required or affirmatively approved by any statute of this state . . . or by a regulatory agency of this state . . . acting under . . . statutory authority vesting the agency with such power.' See Bus. & Com. Code § 15.05(g). Accordingly, we hold that the trial court properly granted a take-nothing summary judgment against CRS on its antitrust claims against Concho Valley and Central Plains.*

The Third Court Of Appeals' opinion raised that alternate state-law ground a second time, regarding Tom Green County (Pet. App. 26), which is where petitioner addressed it (Pet. 14, 2nd par., 23-26), as well as addressing it generally. Pet. 13, 2nd and 3rd par. Petitioner's Question #4 (Pet. 23-26)

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[1] The omitted paragraph should have appeared as the first complete paragraph on Pet. App. 25, followed by the paragraph there that begins "Furthermore, the individuals ... ."

details the law and agency policies that show CONCHO VALLEY's practice of not informing inquiring persons of the choice of CRS' ICF/MR homes violated federal and state medicaid law and the policies of Texas' Department of Mental Health and Mental Retardation ("TDMHMR") and Department of Human Services ("TDHS").

IV. Important Federal Questions Raised

Petitioner's five "Questions Presented" each raise important issues of federal law:

Question #1. LGAA of 1984 Misinterpreted, Merely Limits Remedies. Respondents hoist a red herring with the response that CRS is not seeking antitrust injunctive relief. CV Br. 4-5, TGC Br. 11. That is irrelevant to the Third Court Of Appeals' flawed federal statutory construction (Pet. App. 26). The court reasoned:

Premise #1. The Texas antitrust act exempts "activities"[2]

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[2] Some activities of private actors are statutorily exempted from the operation of the federal antitrust laws, including non-profit labor, agricultural and horticultural organizations, 15 USCA §17 (1997); agricultural producers, 7 USCA §§291, 292, 608b, 608c (1999); fishing industry, 15 USCA §521 (1997); insurance business if every State, D.C., Guam, and Puerto Rico regulate it, 15 USCA §§1012, 1015 (1997); newspapers, 15 USCA §1801 (1998).

Other activities are judicially-exempted from the operation of the federal antitrust laws. Federal case law exempts licensing and assigning patents, *U.S. v. Line Material Co.*, 333 U.S. 287, 309 (1948); baseball, *Flood v. Kuhn*, 407 U.S. 258, 284 (1972); and private citizens petitioning to change the law, *Eastern Railroad Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140 (1961); *UMW Of America v. Pennington*, 381 U.S. 657, 670 (1965). These exemptions might not be incorporated by the Texas antitrust act since it expressly rejects federal decisions that do not promote economic competition. Tex. Bus. & Com.

that are exempt from the "operation" of federal antitrust laws.

Premise #2. Local government activities are exempt from the operation of the federal antitrust laws because LGAA "expressly immunizes all local governmental entities from antitrust liability under the Clayton Act." Pet. App. 26.

The court's error lies in Premise #2. The LGAA of 1984 does limit remedies, but does not exempt any activities of local governments from the operation of the federal antitrust laws. Nor does it make them immune from liability. Local governments' activities are still circumscribed by federal antitrust law, and when they violate that law, they remain liable to injured parties for equitable remedies. Thus, their activities are still subject to the operation of those laws, denying them the Texas exemption.

Question #2. Insufficient *Parker* Inquiry By State Courts. Contrary to respondent's assertion (CV Br. 5), this question does not challenge the Third Court of Appeals' ruling that the **Parker** doctrine is incorporated into the Texas antitrust act. (Question #4 does that.) This question presumes it is incorporated, but contends that the level of factual inquiry and explanation by which the lower courts found *Parker* "state action" to exist in this case was not sufficiently

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Code §15.04 (West 1994). Pet. App. 6.

Since the *Parker* doctrine does not promote economic competition, that federal decision would also be rejected by §15.04. Moreover, since *Parker* inherently cannot operate in all federal jurisdictions, *Parker* could not, even theoretically, make an activity "exempt from the operation of the federal antitrust laws". If parallel "state action" in all 50 states exempted the same activity, it still would not be exempt in D.C., Puerto Rico, and territories where the federal antitrust laws also operate. 15 USCA §§3, 13 (1997).

rigorous. The degree of judicial investigatory and explanatory rigor required to erect the protection of the disfavored *Parker* immunity is an element of the *Parker* doctrine and thus a federal question.

A related federal issue is whether the Third Court of Appeals' lax application of judicial effort and expertise, and failure to craft an acceptably rigorous opinion, violates the ADA, a complaint that could not antedate the court's ruling.

Question #3. Legal Fiction Cannot Guide "State Action" Test. Whether, under the disfavored *Parker* doctrine, a court may decide the appropriate "actor" test based on a single legal fiction describing the actor, and ignore contrary legal fictions and the objective characteristics of the actor, is plainly a federal question. To select the least rigorous "state actor" test over the "municipal" or "private" actor tests, solely based on a limited-purpose legal fiction, is impermissibly arbitrary.

The Third Court Of Appeals' sole basis for applying the "state actor" test to CONCHO VALLEY was a single legal fiction. The court cited Tex. Health & Safety Code §534.001, which says a community MHMR center is an "agency of the state" for purposes of the Texas Tort Claims Act. Pet. App. 25. The court ignored the long list of contrary objective characteristics (Pet. 16-21) that configure CONCHO VALLEY as a local public organization and commercial contractor.

This issue also relates to Question #2 on the minimum judicial inquiry needed to invoke *Parker*, because the court even ignored contrary legal fictions contained in the same

sentence in §534.001,[3] which were enacted later in time (Pet. 16, fn 33, 34, 35) and say a community center is a local government and a unit of local government for limited purposes. The state court's apparent carelessness in applying a disfavored federal immunity to deny an injured party legal redress furnishes the setting for the High Court to address the minimum judicial rigor required to impose such an immunity.

Question #4. Parker "State Action" Doctrine Not Incorporated Into Texas Antitrust Act. This is a federal question about the unique character of the *Parker* doctrine. The Third Court Of Appeals mis-characterized the *Parker* doctrine when it held it was incorporated into the Texas antitrust act. It held that *Parker* is a federal judicial interpretation of a federal antitrust statute comparable to Texas' antitrust statute. Pet. App. 24, lines 5-8. That proposition is impossible in our federal system. *Parker* is inherently and exclusively an interpretation of unique federal antitrust law.

From the perspective of a state antitrust statute, the *Parker* doctrine cannot be a federal judicial interpretation of a comparable federal statute. *Parker* is based on the national government's deference to state sovereignty in our federal system, and the presumption that Congress did not intend the federal antitrust statutes to impinge on state sovereignty. Since a state does not have any lower co-sovereign to defer to, in that respect its antitrust statute is inherently incapable of being comparable to the federal statute and has no comparable need for a *Parker*-like doctrine.

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[3] In June 1989, when the injuries to petitioner CRS began, the statute was found at Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.01 (c) (Vernon Supp. 1988). Pet. App. 3. In 1991 it was recodified as Tex. Health & Safety Code Ann. §534.001.

Note that the Texas legislature, in the Texas antitrust act (Pet. App. 5-7), nowhere mentions *Parker* or expressly directs its use as a model. Since the Texas legislature enacted its own "state action" doctrine ("required or affirmatively approved") which supplies one simple test for all actors, why would it confuse things by obliquely incorporating another model, particularly *Parker*, which is based on uniquely federal concerns and more complex in application?

Question #5. CONCHO VALLEY Did Not Satisfy Minimum Due Process To Become A Lawful Community Center. Whether the minimum formative acts and documentation required by due process were timely supplied, so that CONCHO VALLEY became a lawful public body and community center enjoying attendant governmental immunities, raises the federal question of what due process requires.

V. Miscellaneous Objections By Tom Green County

(i) Record references. Tom Green County says CRS did not show it raised antitrust issues in the trial court with respect to the County. TGC Br. 7. The references in "Plaintiff's First Amended Response To Defendants' Motions For Summary Judgment", which petitioner cited in Pet. 8-9, apply to Tom Green County because the arguments in that response were expressly incorporated by reference, twice, into the summary judgment response petitioner filed with respect to Tom Green County (and duly served on its counsel). CR 1112, 1117.

(ii) Derivative liability. TGC Br. 18. Tom Green County's vicarious liability for the actions of CONCHO VALLEY arises from the common law of agency and associations. Counties' governmental immunity is repealed by the Texas antitrust act. Pet. 13, 1st par. Whether official

immunity can cover these misdeeds is a fact question for trial.

(iii) Applicability of medicaid law. In addition to the references at Pet. 23-24, the record below is replete with references showing the applicability of medicaid law. CR 962, "Texas began voluntary participation in the Title XIX Intermediate Care Facility for the Mentally Retarded (ICF/MR) program in 1972.", TDMHMR's Annual Plan for New Bed Development in the Texas ICF/MR Program for State Fiscal Year 1990, p. 1; CR 631, "Medicaid-funded services provided by [community MHMR] centers include ICF MR, ... Case Management ... and Diagnostics for people with mental retardation.", Texas Health & Human Services Commission's Medicaid Office, "Glossary Texas Medicaid Terms", Texas Medicaid In Perspective, May 1994, cited in Pet. 25, fn 63; CR 638, "ICF MR - (Intermediate Care Facility for Mentally Retarded persons) Optional Medicaid service which provides residential care and services for individuals with a diagnosis of mental retardation.", *id.*; CR 480-481, contract between petitioner CRS and Texas Dept. of Human Services for CRS to provide ICF/MR services under the Texas Medical Assistance Program and receive Title XIX medicaid payments for persons served in home at 2706 Watson St., San Angelo, Texas; CR 1639, TDMHMR Commissioner Don Gilbert affidavit: "To participate in the ICF/MR program and provide ICF/MR services to Medicaid beneficiaries, the provider must qualify for participation in the Title XIX Texas Medical Assistance Program ...."

(iv) Standing, Question #5. An injured private party may attack collaterally a void public organization. *City of West Lake Hills v. State Ex. Rel. City Of Austin*, 406 S.W.2d 722, 727 (Tex. 1971). The formation of CONCHO VALLEY was void because it did not colorably comply with the

community center enabling act and possibly because the act itself is void for uncertainty as a matter of due process.

(v) Causation, Question #5. TGC Br. 10-11. The harm caused by CONCHO VALLEY's representation that it was a lawful community MHMR center, when it was not, is that that status entitled it to be the "designated provider" and the "Mental Retardation Authority" (Pet. 3, 5th, 6th par.; Pet. 4, 1st par.), making it the regional clearinghouse for informing inquiring persons about facilities and services available in the area, a power it used to block access to CRS' homes.

(vi) Raising due process issue, Question #5. TGC Br. 7-9. In its response to the summary judgment motion in the trial court, CRS argued: "A genuine issue of fact exists regarding whether Defendant [CONCHO VALLEY] was a lawful community MHMR center at all times during the period from 1988 through the present." CR 2994. Petitioner submits that fairly raises the legal issue of what minimum amount of procedure and documentation for a lawful community center is required by due process. Moreover, Texas law allows petitioner to raise the due process issue at any point if it is "fundamental error". Fundamental error exists in a civil case where the record shows the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas. *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 328 (Tex. 1993). The public, especially mentally retarded citizens, are directly and adversely affected if an imposter community center, formed without satisfying due process, is withholding vital residential information from mentally retarded persons who need a safe place to live, and claiming governmental immunity when anyone complains. Factual Chronology, Pet. 5-8. That public interest is declared in the laws and policies that guarantee freedom of choice. Pet. 23-26.

(vii) Seriatim? The size of this case reflects serial offenders, not seriatim, and tracks the gradual revelation of an astonishingly broad disregard of the law by public actors.

(viii) Issues before Texas Supreme Court. Since the Texas Supreme refused discretionary review (Pet. 1), petitioner understands it is not required to show it raised these issues before that court. However, its "Petition For Review" to the Texas Supreme Court listed the same 16 "Issues Presented" as were in its brief filed with the Third Court of Appeals. The Texas Supreme Court says each such issue in a petition for review "...will be treated as covering every subsidiary question that is fairly included," Tex. Rules of Appellate Proc. 53.2 (f) (West 2000), and "[t]he argument [in the petition for review] need not address every issue or point included in the statement of issues or points. Any issue or point not addressed may be addressed in the brief on the merits if one is requested by the Court." *Id.*, 53.2 (j).

CONCLUSION

Wherefore, Petitioner respectfully asks the U.S. Supreme Court to grant its petition for writ of certiorari.

Respectfully submitted,

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